UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

September 30, 2021 at 2:00 p.m.

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1. 19-22653-E-7 REECE/RODINA VENTURA
19-2157
VILLANUEVA V. VENTURA ET AL

SCHEDULING CONFERENCE RE: COMPLAINT TO DETERMINE DISCHARGEABLITY OF A DEBT
12-22-19 [1]

The Scheduling Conference is xxxxx

SEPTEMBER 30, 2021 SCHEDULING CONFERENCE

The Trial in this Adversary Proceeding commenced on September 20, 2021. Unfortunately, one of Plaintiff's witnesses was struck by a vehicle when crossing the street to the Courthouse and could not testify. After Plaintiff concluded with his other witnesses, the court recessed the trial and schedule this Scheduling Conference to allow the parties to obtain information on the witnesses condition and when he would be able to testify.

On September 28, 2021, Plaintiff filed a combined Scheduling Conference Report and an Application for Leave to Lodge Transcripts of Defendants' 2004 Examination. Dckt. 58.

For the injured witness (former state court counsel for Defendant-Debtors), his attorney is identified as Kristen Iversen. The information from Ms. Iversen is that the witness will be available to testify, and it is suggested that the court reconvene the trial on November 9, 2021.

November 9, 2021, is an available trial date on the court's calendar. In the suggestion for a continued trial date, counsel for Plaintiff makes a curious statement, "It is unknown if Defendants' counsel is available that date." This indicates that Plaintiff's two attorneys did not attempt to reach out and communicate with Defendant-Debtors' counsel about possible dates, but instead just unilaterally suggested a date to the court. This is indicative of the professional dysfunctionality between the various attorneys in this Adversary Proceeding.

Plaintiff also slips into the Status Report a request for an order allowing Plaintiff to put into evidence certified copies of transcripts of the Defendant-Debtors' 2004 examinations. The grounds for requesting such an order is stated as:

> The defendants were deposed in 2004 exams, and these transcripts may greatly benefit the Court in hearing and evaluating Defendants' testimony.
>
> Plaintiff intends to use these transcripts, if necessary, as impeachment evidence during testimony as needed.

Status Report, p. 2:26-27, 3:1-2; Dckt. 58.

As provided in Federal Rule of Civil Procedure 7(b)(1)(A), which is incorporated into Federal Rule of Bankruptcy Procedure 7007, "A request for a court order shall be made by motion," and such motion "must be in writing unless made during a hearing or trial." Such a request buried in a Status Report is not a motion made during the trial or in writing as required by Local Bankruptcy Rule 9014-1. Plaintiff's very experienced bankruptcy counsel and very experienced state court co-counsel should meet and confer concerning practice in federal court and how to properly requests orders from the court.

Plaintiff's counsel also state that they are purchasing transcripts of the trial and believe that such can be useful to the parties and court in the court making its ruling. For the court's part, the testimony to date has been very simple and easy to understand. As with many other trials, this does not appear to be a situation where the court needs transcripts.

Plaintiff's counsel also suggests that if the court believes post-trial briefing is necessary, such should be scheduled for three weeks after the trial concludes. As Plaintiff's very experienced bankruptcy counsel can tell her team and client, the Bankruptcy Court's process of having directly testimony statements where counsel for a party can lay out clear testimony for non-hostile witnesses and the well drafted (as in this Adversary Proceeding) post-trial briefs are rarely necessary. The respective counsel can clearing make their closing arguments tying together the evidence and law (which nondischargeability law this court has addressed numerous time on the bench). If there was a new legal issue that arose for which post-trial briefs were necessary, the court would readily request it from the parties.

At the Scheduling Conference, **xxxxxxx**

2.	**20-90710-E-12** **DCJ-3** **2 thru 6**	**LESLIE JENSEN** **David C. Johnston**	**CONTINUED STATUS CONFERENCE RE: MOTION TO CONFIRM CHAPTER 12 PLAN** **3-18-21 [69]**

The Status Conference is xxxxxxx

SEPTEMBER 30, 2021 STATUS CONFERENCE

Through a Status Report in a related adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period from late September 2021 through late November 2021.

At the Status Conference, xxxxxxx

Continuance of August 19, 2021 Status Conference

The Parties being actively participating in dispute resolution mediation and no action may be taken on the present Motion until other fundamental issues, including whether Debtor may be a debtor in a Chapter 12 case, the court continues the Status Conference by final ruling to save the parties time and expense, allowing them to focus on the mediation issues.

REVIEW OF MOTION

Leslie F. Jensen, the Chapter 12 Debtor in this case has set for hearing confirmation of its Chapter 12 Plan (Dckt. 70).

The Plan calls for payments of $4,000 per month for a period of 60 months to Michael H. Meyer, Chapter 12 Trustee (the "Trustee"), who will pay expenses of administration in full, nominal priority claims in full, a small partially secured claim of a judgment lien creditor, and 18 cents on the dollar on general unsecured claims totaling $1,108.234, which are not secured by any assets and not covered by insurance.

Moreover, the Plan calls for all other claims which are secured by the Debtor's assets or the assets of L & L Investments, LLC, a California limited liability company ("L & L") to be unimpaired by the Plan and paid directly by the Debtor or by L & L. According to the Plan, the claim held by Iraj Sabahi, to the extent valid and to the extent of insurance coverage, will be paid by the Debtor's errors and omissions policy and not by the Trustee.

April 29, 2021 Hearing

At the hearing the Parties addressed with the court the need to address two issues prior to proceeding with the cost and expense of confirmation discovery and litigation – determine whether Debtor qualifies for relief under Chapter 12 and the pending Motion to Dismiss or Convert this case filed by Krista Osmers and The Dyer Law Firm. Motion, Dckt. 96

The court continues this hearing to allow the parties to focus on the other two matters, with the court issuing an Order to Show Cause re Eligibility of Debtor to Obtain Relief under Chapter 12 of the Bankruptcy Code.

Trustee's Opposition

Trustee filed an Opposition on April 14, 2021. Dckt. 77. Trustee opposes the confirmation on the following basis:

A. The court should first determine whether Debtor is eligible for relief as a "family farmer" as defined in 11 U.S.C. § 101(18)(a).

B. Debtor's plan fails to provide all projected disposable income over the applicable commitment period.

C. The Plan may have been proposed in bad faith.

D. The Plan fails the Liquidation test.

Creditors' Objections

On April 15, 2021 Creditors Krista Osmers and her counsel The Dyer Law Firm filed an Objection to confirmation on the basis that:

A. Debtor is not eligible for chapter 12 relief.

B. The Plan is not proposed in good faith where Debtor has misrepresented and omitted facts about assets and finances.

C. Debtor is not committing all of her projected disposable income to the plan.

D. The Plan is not feasible.

Creditor Iraj Sabahi filed an Objection to the confirmation adopting the same arguments as creditor Krista Osmers and the Trustee. Dckt. 85. Additionally, Creditor Sabahi requests the court permit creditors to conduct discovery on the issues raised in the Objections, such as the value of Debtor's L&L interest, the value of Debtor's

DISCUSSION

A court may proceed with the confirmation of a Chapter 12 Plan pursuant to 11 U.S.C. § 1225 provided that:

A. The Plan complies with the provisions of Chapter 12 of the Bankruptcy Code and with the other applicable provisions of this title;

B. Any fee, charge, or amount required under chapter 123 of title 28 [28 U.S.C. §§ 1911 et seq.], or by the plan, to be paid before confirmation, has been paid;

C. The Plan has been proposed in good faith and not by any means forbidden by law;

D. The value, as of the effective date of the Plan, of property to be distributed under the Plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date;

E. With respect to each allowed secured claim provided for by the Plan—

1. The holder of such claim has accepted the Plan;

2. The

a. Plan provides that the holder of such claim retain the lien securing such claim; and

b. The value, as of the effective date of the Plan, of property to be distributed by the Trustee or Debtor under the Plan on account of such claim is not less than the allowed amount of such claim; or

3. Debtor surrenders the property securing such claim to such holder;

F. Debtor will be able to make all payments under the Plan and will be able to comply with the Plan; and

G. Debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if Debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation.

11 U.S.C. § 1225(a).

If the trustee or the holder of an allowed unsecured claim objects to confirmation of the Plan, then the court may not approve the Plan unless, as of the effective date of the Plan–

(A) the value of the property to be distributed under the Plan on account of such claim is not less than the amount of such claim;

(B) the Plan provides that all of Debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the

first payment is due under the Plan will be applied to make payments under the Plan; or

(C) the value of the property to be distributed under the Plan in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first distribution is due under the Plan is not less than Debtor's projected disposable income for such period.

(2) For purposes of this subsection, "disposable income" means income that is received by Debtor and that is not reasonably necessary to be expended–

(A) for the maintenance or support of Debtor or a dependent of Debtor or for a domestic support obligation that first becomes payable after the date of the filing of the petition; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of Debtor's business.

11 U.S.C. § 1225(b)(1).

Trustee has presented an Opposition. Moreover, two creditors holding judgment-based claims have also opposed confirmation of the case. Both Trustee and Creditor Krista Osmers points the court first to whether Debtor is eligible as a "family farmer" for reorganization under Chapter 12, where Trustee notes that a Status Conference had been set in order to present evidence as to this issue and Creditor Osmers arguing that Debtor is not a family farmer.

This is indeed the threshold question. A Status Conference was held on January 28, 2021, where the court discussed with Trustee, Debtor and various creditors this issue.

According to Debtor, the LLC is the owner of the almond orchard, the farming operation. Debtor owns 50% of the membership interests (subject to restrictions in the operating agreement) and manages the LLC. Debtor asserts that Debtor qualifies as a family farmer entitled to relief under Chapter 12 because the majority of her debt, excluding her residence, is from farming, and because more than 50% of her gross revenue in 2019, the year preceding the filing of this bankruptcy case, was from farming. Moreover, Debtor asserts that 100 percent of the gross revenue of the LLC has been allocated to Debtor for many years and she has fully managed and is accountable for every cent of the gross revenue.

Here, however, Debtor's income is based on her law practice. As previously discussed, Debtor's Schedule I stated that she is a self employed attorney with a monthly income of $5,500 in wages, salary, or commission. At the Status Conference, as it pertained to Debtor's income, Debtor's counsel "admitted that the $5,500 a month does not represent her actual income from her law practice, but a net amount of income after deducting all of the losses assigned to her by the Limited Liability Company in which she is a fifty percent (50%) owner with Debtor's sister." *Civil Minutes*, Dckt. 54, at 6.

Debtor does not list any income or cash flow coming from the LLC. Debtor does not provide any financial information concerning the farming operation, whether the current operation is cash flow positive, and whether there is any farming operation for a Chapter 12 reorganization.

In the Motion for confirming the proposed Plan, while explaining that the plan is feasible based on her law practice income, Debtor glosses over the LLC and simply states "Debtor has such large operating losses which are carried forward from L&L that she does not expect to have any federal or state income tax liability fort the life of the Plan." Though there are operating losses that allows the member of an LLC to keep all the positive cash flow tax free, that does not mean that there is not a positive cash flow which is income, for bankruptcy purposes, to fund the plan.

As was also previously discussed at the January 2021 Status Conference, the court stated the following:

> In response to Question 46 Debtor states that she has no interest in "any farm- or commercial fishing-related property?" *Id.* at 9.
>
> Going back to Schedule I, Debtor states under penalty of perjury having no other income from any source, with the $5,500 in "gross wages, salary, and commissions" from her "Employer" Law Office of Leslie F. Jensen, being her only income. *Id.* at 27. Debtor has no income other than from her "employment" as a lawyer. Though stated as "gross wages, salary, and commissions," Schedule I states that there are no deduction from such "wages" for federal and state taxes, or Social Security tax.
>
> On Form B6I attached to Schedule I, Debtor state that she is an "almond grower" who has been employed for seven years by L & L Investments, LLC. *Id.* at 29. No income from such employment by L & L Investments, LLC is shown on Schedule I.
>
> On Schedule J, Debtor lists ($10,479) in expenses, which include mortgage, taxes, and maintenance in Alabama, but no provision for payment of income taxes, Social Security taxes, or self-employment taxes (if Debtor is self-employed and not an employee of the "Law Offices of Leslie F. Jensen." *Id.* at 30-31.
>
> The above information is not changed on the Amended Schedule A/B filed on November 30, 2020, by Debtor, one day after the original Schedule A/B was filed by Debtor. Dckt. 22.

Id., at 4. To this day Debtor has not filed Supplemental or Amended Schedules addressing the court's comments.

Collier on Bankruptcy provides insight in determining whether Debtor is a "family farmer" and thus eligible for Chapter 12 relief:

> The definition of family farmer is divided into two parts. The first applies to individuals, and the second applies to corporations and partnerships. Each sets up a different, though related, test for determining whether individuals, corporations and partnerships qualify as family farmers.
>
> Both have an aggregate indebtedness limitation of $10,000,000, and require the debtor to be engaged in a farming operation at the time that the case is commenced. **If the case involves an individual, the farming operation must be owned and operated by such individual or by such individual and such individual's spouse.**

> If the case involves a corporation or partnership, the entity must be engaged in a farming operation and the farming operation must be conducted by a family that owns, either alone or in conjunction with relatives, more than 50 percent of the stock of the entity. **For both individuals and entities, there is a further requirement that not less than 50 percent of the debtor's noncontingent, liquidated debts at the commencement of the case, other than debts for a dwelling used as a principal residence, must arise out of the debtor's farming operation.**
>
> **An individual debtor must fulfill one additional test. The individual debtor must have received from his or her farming operation at least 50 percent of such individual's gross income during the taxable year preceding the year in which the petition was filed or during each of the second and third taxable years preceding the year in which the petition was filed.**

2 Collier on Bankruptcy P 101.18 (16th 2021) (Emphasis added.).

> As explained in Collier,
>
> To satisfy the farm income test, **an individual must have received at least 50 percent of such individual's gross income from the individual's farming operation** during the taxable year immediately preceding the taxable year in which the petition was filed or during each of the second and third years preceding the taxable year in which the petition was filed.

2 Collier on Bankruptcy P 101.18 (16th 2021) (Emphasis added.).

> Finally, relevant to the case at hand,
>
> Determining whether the farm income test has been fulfilled requires the court to first determine the amount of the debtor's gross income during the relevant tax year and then to determine the portion of that income attributable to the debtor's farming operation.

2 Collier on Bankruptcy P 101.18 (16th 2021).

In defining "gross income," the court cites to *In re Sandifer,* where as the bankruptcy court held that:

> For purposes of determining whether Chapter 12 debtors met 50 percent of gross income requirement in 11 USCS § 101(18), court looked to definition of gross income in 26 USCS § 61 and determined that gross income reported by their limited liability company (LLC), which was formed by debtor husband and his son for their farming operation, should pass through to members and be considered income of those members; as result of attributing farm income reported by LLC to debtors, they earned at least half of their gross income from farming operation and met definition of "family farmer" in § 101(18) for purposes of their eligibility under 11 USCS § 109(f). *In re Sandifer*, 448 B.R. 382, 2011 Bankr. LEXIS 1410 (Bankr. D.S.C. 2011).

11 USCS § 101 (120. —Gross Income.)

In this case, the court the turns to Debtor's Statement of Financial Affairs, Docket 21, which provides the following information:

For last calendar year: (January 1 to December 31, 2019)	Operating farm - gross	$486,671.00
	Operating law firm - gross	$451,023.00
For last calendar year: (January 1 to December 31, 2018)	Operating farm - gross	$542,226.00
	Operating law firm - gross	$396,058.00

Statement of Financial Affairs, at 34. (No income has yet been provided by the year 2020.) Thus, it seems Debtor meets the income criteria where the farming operation's gross income, which she has testified is 100% attributable to her, is higher than the gross income for her law practice.

Debtor however has not provided the net income of the farming operation. The only net income provided is that for the law practice as stated in Debtor's Schedule I and discussed above. In her Declaration in support if confirmation, Debtor testifies:

> The only net income I have is from my law practice[.]

Declaration, Dckt. 71, ¶ 9.

This statement may be taken to have two meanings: (a) either the farming operation does not generate cash flow and Debtor is covering the farm's losses with her law practice income or (b) by "net income" Debtor means taxable income. Debtor's counsel has previously referred to "operating losses" as it pertains to the farming operation and notwithstanding these losses, it is possible that there is net income coming from the farming operation and if so additional income that could fund the plan. As already noted, Debtor has not filed neither Amended nor Supplemental Schedules providing for farming income. Debtor has failed to provide financial information as it pertains to the farming operation which would be relevant as to the feasibility of the Chapter 12 Plan.

Turning to Creditor's objection related to Debtor's expenses. The court had previously noted an expenses issue at the January 28, 2021 Status Conference:

> On Schedule J, Debtor lists ($10,479) in expenses, which include mortgage, taxes, and maintenance in Alabama, but no provision for payment of income taxes, Social Security taxes, or self-employment taxes (if Debtor is self-employed and not a true employee of the "Law Offices of Leslie F. Jensen," which employer pays such taxes. *Id.* at 30-31.

Civil Minutes, Dckt. 54, at 4. As noted by Creditor, in reviewing Debtor's Schedules I and J, Debtor's income of $5,500.00 minus expenses in the amount of $10,479.00, there is a shortage of ($4,979.00). In her

Declaration in support of confirmation, Debtor states that as she is 65 years old and, if necessary, she will apply for Social Security benefits and would receive approximately $2,500. Declaration, Dckt. 71, at ¶ 20. This additional income would still not be sufficient to cover her scheduled expenses.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor in Possession's Status Report

On August 14, 2021, Debtor in Possession filed a Status Report suggesting that the court to continue the Scheduling Conference to September 30, 2021 at 2:00 p.m. on the basis that (1) the parties now having submitted their case to the Bankruptcy Dispute Resolution program and their mediation session has been scheduled to August 31, 2021 and (2) the Court has already continued hearings on the matters identified as docket control numbers HLG-1, RHS-2, and DCJ-4 to September 30, 2021 at 2:00 p.m. pursuant to a joint request of the parties.

3. 20-90710-E-12 HLG-1 — LESLIE JENSEN, David C. Johnston — CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 12 TO CHAPTER 7 AND/OR MOTION TO DISMISS CASE 4-27-21 [96]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, and Office of the United States Trustee on April 28, 2021. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

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

The Hearing on the Motion to Convert or Dismiss the Chapter 12 Bankruptcy Case to a Case under Chapter 7 is xxxx.

SEPTEMBER 30, 2021 HEARING

Through a Status Report in a related adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period from late September 2021 through late November 2021.

The court's review of the file indicates that nothing further has been filed by the parties. At the September 30, 2021 hearing, xxxxxxx

June 24, 2021 Hearing

At the June 24, 2021 hearing on the Motion to Dismiss and the Order to Show Cause, the court had an extensive discussion with the Parties. Additionally, the Debtor and Debtor in Possession filed an election to dismiss this case pursuant to 11 U.S.C. § 1208(b). The court discussed with the parties the corresponding authority give to the court to convert a Chapter 12 case to Chapter 7 pursuant 11 U.S.C. § 1208(d) if it is determined that the debtor had committed fraud in the case. The court questioned whether Congress had given a debtor who committed fraud the ability to expunge the power of the court to convert the case to Chapter 7 if fraud had occurred.

Many issues were discussed as reflected in the recorded record of the hearing. What developed was a possible consensual dismissal of this case, with Debtor's counsel representing that Debtor sought dismissal so she court address the judgement of Krista Osmers. Ms. Osmers has been the only active creditor in this case. As such, a structured dismissal based on mutual agreement of the Debtor and Ms. Osmers, which could include an agreed payment plan outside of bankruptcy (with appropriate safeguards and security for Ms. Osmers and providing Debtor with a more certain financial future) may be possible. Both the Debtor and Ms. Osmers, notwithstanding the complained about litigation tactics and asserted "You will Never Get Paid on Your Judge" statements attributed by Ms. Osmers' counsel to the Debtor, have hard legal and economic realities constraining them in their discussions. The Debtor could find herself a Chapter 7 debtor, with a Chapter 7 trustee digging through all of her finances and dealings, including the LLC into which she transferred her interests in the orchard property days after the adverse verdicts came down in her litigation with Ms. Osmers.

The court continued the hearings on both the Motion to Dismiss and Order to Show Cause to 2:00 p.m. on July 29, 2021, to afford the parties to meet and confer, engage in constructive, good faith settlement negotiations, and hopefully come up with a resolution that can bring their long, expensive legal struggles to an end. On July 23, 2021, the Creditor and Debtor jointly requested continuance of the motion to September 30, 2021. On July 26, 2021, the court issued an order continuing the Motion to September 30, 2021.

The court shall conduct a brief status conference with David Johnston, Esq., counsel for the Debtor in Possession, and Valery Loumber, Esq., counsel for Ms. Osmers for a quick oral report on the progress and consider any oral motions for orders that would assist that process (including BDRP appointment if such assistance is deemed beneficial).

REVIEW OF MOTION

This Motion to Convert the Chapter 12 bankruptcy case of Leslie F. Jensen ("Debtor") has been filed by Krista Osmers and the Dyer Law Group ("Movant"), a creditor.

Movant asserts that the case should be dismissed or converted based on the grounds as discussed below.

Active Concealment of Fraudulent Transfers

Movant alleges several transactions Debtor has undertaken since the judgement against them constitute fraudulent conveyances which are avoidable by the bankruptcy estate. Movant points the court to Cal. Civ. Code §3439.04(b), with the code section listing the factors that may be taken into consideration when Debtor has made transfers that may be fraudulent. These "**badges of fraud**" are (this court reformatting the factors so they stand out as separate bullet items, but not changing the text of the ruling):

(1) Whether the transfer or obligation was to an insider.

(2) Whether the debtor retained possession or control of the property transferred after the transfer.

(3) Whether the transfer or obligation was disclosed or concealed.

(4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(5) Whether the transfer was of substantially all the debtor's assets.

(6) Whether the debtor absconded.

(7) Whether the debtor removed or concealed assets.

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

Movant notes that the badges are factors and not elements and that the court may find fraud at the court's discretion after weighing the factors. Movant then applies the factors to Debtor's actions:

A. Transfer of Debtors interest in an Orchard to her LLC which should be considered an insider. (Badge 1)

B. The transfer of the Orchard interest was done 8 days after verdict in favor of Creditor. (Badges 4 and 10)

C. There is nothing in Debtor's schedules that shows Debtor received any consideration for the transfer to the LLC. (Badge 8)

D. The transfer of the orchard to the LLC made Debtor insolvent (Badge 9)

E. The orchard was all of the Debtors assets that could not be exempted. (Badge 5)

F. While the interest was transferred to the LLC, Debtor retained possession and revenue of the orchard. (Badge 3).

In addition to these conveyances, Debtor encumbered the Orchard with around $1.8 million in loans. There is no record of where this money went. Moreover, Debtor took out a personal loan stated to be for the benefit of the LLC's farming operations on the Orchard and personally guaranteed by Debtor.

Creditor believes the fact Debtor was aware of these transfers, concealed them, and misrepresented her assets which shows this was an attempt to deceive and induce reliance of creditors with false information thereby undermining the bankruptcy process.

Debtor's Concealed and Uncommitted Disposable Income

Movant believes Debtor has been untruthful with the figures Debtor submitted in her Schedules I and J. The misrepresentations provide for an inaccurate disposable income with which to fund the proposed plan. Namely, the Creditor takes issue with:

1. Income generated from law practice as $5,500 per month

2. Expenses at $10,479 per month

3. Historical Monthly Income between $33,333 and $37,500 per month.

The alleged misrepresentation is highlighted by Debtor's proposal to pay $4,000 a month as part of her proposed plan without accounting for it in Schedules filed with the court under penalty of perjury. Thus, the Creditor believes Debtor is undermining the bankruptcy process and should not be allowed to continue as the Debtor in Possession.

False Assertion Regarding Orchard's Valuation

Debtor has asserted that the Orchard cannot be valued and is not marketable for the purposes of being used as part of the Chapter 12 plan due to:

1. Its lack of a water source.

2. The high levels of mercury in water available on the property.

3. The low production records of the almonds grown on the Orchard.

4. The inability of a buyer to secure financing to purchase the Orchard.

Movant does not refute any of Debtor's statements concerning the conditions of the Orchard. However, Movant highlights the fact that there must be a valuation on the property given that Debtor's LLC was able to secure three separate loans from a reputable bank totaling $1.8 million from 2017-2019. Thus, Debtor's claim that the land cannot be valued is false.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 3, 2021. Dckt. 124. Debtor opposes on the following basis:

1. The only timely evidence that supports Creditor's motion does not comply with Local Rule of Bankruptcy Procedure 9004-2(d)(1). This is because the exhibits are attached directly to "the only timely declaration submitted in support of the Motion".

2. Michael Dyer's supplemental declaration was untimely and should be stricken. At the May 3, 2021 hearing, the court ordered that all supplemental pleadings be filed and served by May 15, 2021. Michael Dyer's supplemental declaration was filed past the deadline on May 17, 2021 and is thus untimely. This untimeliness is grounds for the declaration to be stricken.

3. There is no evidence in support of the motion in either declaration filed with the court. Debtor argues that Michael Dyer's untimely declaration is filled with "hunches, conclusions of law, inadmissable hearsay, and unsupported arguments. In addition, Val Loumber's declaration simply verifies copies of a proof of claim filed by Bank of Stockton and offers no information to support a contention of "fraud in connection with the case". Moreover, the proof of claim supports Debtor's claim that the majority of her debt arises from farming related activities.

4. The Dyer Law Firm is not a creditor since they have not filed a proof of claim in the present case. Debtor does not contest the fact The Dyer Law Firm might be entitled to a portion of the claim recoverable by Krista Osmers. Debtor alleges The Dyer Law Firm has issued subpoenas ostensibly to conduct discovery in this contested matter even though the depositions will take place after the record closes. Some of the subpoenas were issued in the adversary proceeding involving Krista Osmers where discovery has not been permitted.

5. There have been no fraudulent transfers and that Creditor has not offered any admissible evidence with which to support their claim of fraud. Debtor states she transferred her portion of the Orchard to the LLC almost four years before the filing of the petition. Moreover, the Debtor asserts the Orchard is moot to the estate as the personal guarantee of the loan by Debtor means it is impossible to set aside the transfer even if it a fraudulent conveyance. This is because the estate would need to pay Bank of

Stockton's deed of trust before there could be recovery of real property by the Debtor in Possession.

11 U.S.C. § 548 is inapplicable since it can only avoid transfers made within a two year pre-petition period and the Orchard's transfer occurred almost four years before filing of the petition. Debtor contends that even applicable California law cannot reach as far back as the date of the transfer and that there has been no tolling of the reach back period in this case.

The transfer of the orchard does not meet the standard set forth in §5448(a)(1)(A) (presumably Debtor meant § 548(a)(1)(A)). Under § 548 transfer must have been done with the "intent to hinder, delay or defraud creditors". The Debtor states there are no facts in evidence to support this contention. Moreover, Debtor points to the fact that Debtor did not attempt to hide her other real property assets as evidence and thus is acting in good faith.

Creditor's judgment was not entered on December 2016 but was entered almost seven months later.

Debtor asserts § 548(a)(1)(B) is also inapplicable. Debtor rejects the Creditor's assertion that she did not receive consideration for her transfer of the Orchard. Debtor states the consideration was the 50% stake in the family LLC. Under California law, such transfers do not result in real property being reassessed as this is a transfer to a successor entity.

Even with the judgement against her by Creditor, such transfers did not render her insolvent at the time of transfer.

Finally, Debtor asserts that the creation of L&L and the procuring of the loans from Bank of Stockton were prudent and documented business decisions to develop and expand the family farm. The creation of the LLC allowed for more efficient business operation and was not solely created to shield the Orchard from potential creditors.

6. Debtor states that at the time of Debtor's transfer of her property interest to L&L, the LLC had equity of $5,055,229.00. At that time, there were projections to expand the almond operation and the loans totaling $1.8 million from Bank of Stockton were necessary to make the Orchard operational. The market conditions and the drought have made those plans economically unfeasible and that is the reason for the diminution of assets.

APPLICABLE LAW

Section 1208(c) authorizes the court to dismiss a case for cause on request of party in interest. Specifically, the Bankruptcy Code provides a list for grounds to dismiss:

(c) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
>
> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
>
> (3) failure to file a plan timely under section 1221 of this title;
>
> (4) failure to commence making timely payments required by a confirmed plan;
>
> (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
>
> (6) material default by the debtor with respect to a term of a confirmed plan;
>
> (7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;
>
> (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;
>
> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
>
> (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. § 1208(c).

The provisions of section 1208(c) are similar to sections 1112(b) and 1307(c), which govern dismissal of chapter 11 and chapter 13 cases, respectively. [FN.1] Unlike those two sections, section 1208(c) only authorizes dismissal of the case. Because the chapter 12 debtor is a farmer, the court may not convert a case involuntarily to chapter 7 even if the court believes that doing so is in the best interests of creditors, except where court finds that the debtor has committed fraud in connection with the bankruptcy case as provided under 11 U.S.C. § 1208(d).

FN.1. Questions of conversion or dismissal in a Chapter 13 or Chapter 11, must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based

on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

Section 1208(d) authorizes the court to convert a Chapter 12 case to one under Chapter 7 on request of a party in interest. If after notice and a hearing the court finds that the debtor has committed fraud in connection with the case, the court may convert over debtor's objection. Collier on Bankruptcy further explains:

> This section refers to fraud generally and is not limited, as is section 1208(c)(7), to fraud in connection with obtaining confirmation of a plan. The requirement of notice and a hearing means an oral motion for conversion is not appropriate. *Snider v. Rogers (In re Rogers)*, 2018 Bankr. LEXIS 187 (Bankr. W.D.N.Y. Jan. 25, 2018). The proper standard of proof for showing fraud for conversion under section 1208(d) has not been settled. *See In re Packer*, 586 B.R. 274, 282–83 (Bankr. W.D. Ill. 2018) (noting that courts disagree on whether to apply the preponderance of the evidence standard or the clear and convincing standard).

8 Collier on Bankruptcy P 1208.04 (16th 2021).

Unlike Chapter 11 and 13, where a farmer debtor's case may not be converted over the debtor's objection, Section 1208 is the only provision in the Code that authorizes involuntary conversion to Chapter 7 where the debtor is a farmer. 8 Collier on Bankruptcy P 1208.04 (16th 2021).

The types of fraud that might be considered cause for an involuntary conversion would include intentional concealment of assets and intentional misrepresentations to the court. *See In re Caldwell*, 1001 B.R. 728 (Bankr. D. Utah 1989) (where conversion of a Chapter 12 into a Chapter 7 was warranted after Debtor's schedules were intentionally and materially misleading); *In re Zurface*, 95 B.R. 527 (Bankr. S.D. Ohio 1989) (finding the fraudulent transfer of a assets to a family owned corporation is also grounds for conversion.); *In re Kloubec*, 268 B.R. 173 (N.D. Iowa 2000) (where Debtor's hiding of assets was grounds for conversion to Chapter 7); and *Clark v. Devries* (*In re Clark*), 2016 U.S. App. LEXIS 10835 (9th Cir. June 15, 2016) (unpublished) (conversion to Chapter 7 warranted after debtor presumed to sell assets after a court order finding debtor had no ownership interest in said assets).

There is no need for a showing that creditors relied to their detriment on the debtor's fraudulent statements or acts. *In re Caldwell*, 101 B.R. 728 (Bankr. D. Utah 1989).

DISCUSSION

As a starting point, the court addresses Debtor's timeliness argument. Debtor raised the issue that Movants' declaration and exhibits are not timely and thus there is no evidence to support creditor's assertions.

At the May 3, 2021 hearing, the court ordered that all supplemental pleadings be filed and served by May 15, 2021. The docket shows Movant's declaration and exhibits were filed on May 17, 2021.

The court notes that May 15, 2021 was a Saturday. Federal Rule of Bankruptcy Procedure Section 9006(a)(1)(C) thus applies. This section states that when a court deadline falls on a Saturday,

Sunday, or legal holiday, the filing party has until the end of the next court date to submit the filings in order to meet the notice requirements. In this instance, the next court date was Monday, May 17, 2021. Debtor admits to having received the documents on Monday, May 17, 2021. The documents were filed with the court on Monday, May 17, 2021. Thus, Movants' filing was timely.

The court now turns to the substantive arguments. Movant's claim that the Debtor's transfer of ownership from herself to the LLC was a fraudulent conveyance is properly before the court. The Debtor asserts the Orchard's deed was transferred on December 22, 2016 while the judgement was not entered against Debtor until July 7, 2017 (more than half a year later).

The court finds this argument being made in less than good faith, and an incomplete representation of the relevant facts before the court. Though the judgment was not entered until July 7, 2017, more than six months before the "entry" of the judgment, Debtor does not address that while the judgment was entered in July 2017, the jury's verdict in favor of Movant and against Debtor on Movant's Cross-Complaint and against Debtor on her Complaint were given December 14, 2016. Exhibit 1, Dckt. 119. From what has been presented to the court about the appeals taken and the various attorneys that Debtor lined up to file *amicus* briefs in support of her position (for what Proof of Claim have been filed by those "*amicus*" attorneys), it appears that there were extensive post-verdict proceedings, while could likely have caused a fifteen month delay.

Apparently it is asserted that Debtor's transfer of her asset into the LLC occurring just eight (8) days after the $300,000 (not including interest, attorney's fees and costs) financially adverse to Debtor verdicts were issued in the State Court. The evidence presented create an objective suspicion that Debtor's conveyance was in response to the verdict documenting the highly financially adverse to the Debtor verdicts.

Though Debtor may have harbored a fervent belief that she could not lose (the appeals and lining up *amicus* counsel who now assert claims in this bankruptcy case), the writing was clearly on the wall for the Debtor when the December 14, 2016 adverse verdicts were entered. Debtor knew she was soon to be receiving a judgment against her.

As argued, it can be inferred that this transfer was intended to hinder, delay, or defraud Movant, who was to be her creditor for the judgment on the horizon. Delay of the entry of the judgment does not alter Debtor's (who is an attorney) knowledge of the verdict and the financially horrible judgment that would soon be entered. The court looks to the timing of the transfer, the fact the transfer of the property was a transfer of substantially all of Debtor's assets, the fact the transfer left Debtor insolvent (Debtor having no other property that Movant could go after), and yet Debtor retained control and asserting direct interest in the revenues of the Orchard. These are factors that indicate a fraudulent conveyance under Cal. Civ. Code §3439.04(b).

Next, Movant points the court to the Debtor's actions in encumbering the Orchard with $1.8 million in loans in the name of the LLC and further assuming personal loans for the benefit of the LLC. The actions taken by Debtor in the bankruptcy proceeding may indicate that the Debtor has attempted to hinder creditors where the LLC benefitted from these funds and yet Debtor seeks to have them discharged under her name. Moreover, Movant alleges that with knowledge of these dealings, Debtor failed to originally report them as part of her petition, and purposely omitted these obligations from Debtor's hypothetical liquidation analysis. In her Opposition, Debtor alleges that the funds were used to rehabilitate the Orchard and make the property operational and profitable. Yet, Debtor provides no explanation for why Debtor originally failed to disclose the transactions in this bankruptcy case.

Movant's claim that Debtor has concealed and uncommitted her projected disposable income is also well taken. This is not the first time that the court has encountered this issue; the court having raised this issue apparent on the face of pleading filed by Debtor under penalty of perjury at previous hearings. Debtor's Schedules I and J show that Debtor has no disposable income and that her monthly net income is ($4,979).

Based on the information provided in her Schedules, there is no way that Debtor could fund a plan to repay her creditors as required in a Chapter 12 case. Moreover, Debtor's response in her Statement of Financial Affairs indicate Debtor's law practice has historically generated between $33,333 and $37,500 a month. Without an accurate representation of Debtor's financials, neither the court nor the creditors can make a fair assessment of Debtor's good faith in filing this case.

Movant also claims that Debtor's assertion that the Orchard cannot be valued is false. In the time after conveyance of the property to the LLC, Debtor encumbered the Orchard with over $1.8 million in loans. Debtor's assertions of the conditions of the Orchard and the issues around it do not change the fact the Bank of Stockton loaned substantial funds on three separate occasions secured by the Orchard.

The bank must have had some valuation of the property to make them secure enough to make the substantial loans, and the fact that the conditions might have deteriorated or that someone was unable to secure a loan to purchase the property do not indicate the land cannot be valued. The fact that Debtor does not like the proposed valuation of the land does not mean it cannot be valued. Orchard valuation is also not a new argument in this court. The court having previously raised this issue with Debtor.

Finally, Debtor raises the issue that Movant, The Dyer Law Group, is not a creditor to the bankruptcy estate as they have never submitted a proof of claim. The fact that The Dyer Law Group might be entitled to some portion of the judgement that is owned to Krista Osmers does not disqualify them from being a creditor of Debtor. Though the claims bar date in the Chapter 13 case, if converted to Chapter 7, a new claims bar date springs into life.

4.	**20-90710-E-12** **RHS-2**	**LESLIE JENSEN** **David C. Johnston**	**CONTINUED ORDER TO SHOW CAUSE WHY THE COURT SHOULD DETERMINE THAT DEBTOR LESLIE JENSEN IS A FAMILY WHO MAY COMMENCE A CHAPTER 12 CASE** **5-3-21 [105]**

The Order to Show Cause is xxxxxxx

SEPTEMBER 30, 2021 HEARING

Through a Status Report in a related adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period late September 2021 through late November 2021.

The court's review of the file for this Case on September 28, 2021, reviewed that no further pleadings have been filed. At the hearing, **xxxxxxx**

June 23, 2021 Hearing

At the June 24, 2021 hearing on the Motion to Dismiss and the Order to Show Cause, the court had an extensive discussion with the Parties. Additionally, the Debtor and Debtor in Possession filed an election to dismiss this case pursuant to 11 U.S.C. § 1208(b). The court discussed with the parties the corresponding authority give to the court to convert a Chapter 12 case to Chapter 7 pursuant 11 U.S.C. § 1208(d) if it is determined that the debtor had committed fraud in the case. The court questioned whether Congress had given a debtor who committed fraud the ability to expunge the power of the court to convert the case to Chapter 7 if fraud had occurred.

Many issues were discussed as reflected in the recorded record of the hearing. What developed was a possible consensual dismissal of this case, with Debtor's counsel representing that Debtor sought dismissal so she court address the judgement of Krista Osmers. Ms. Osmers has been the only active creditor in this case. As such, a structured dismissal based on mutual agreement of the Debtor and Ms. Osmers, which could include an agreed payment plan outside of bankruptcy (with appropriate safeguards and security for Ms. Osmers and providing Debtor with a more certain financial future) may be possible. Both the Debtor and Ms. Osmers, notwithstanding the complained about litigation tactics and asserted "You will Never Get Paid on Your Judge" statements attributed by Ms. Osmers' counsel to the Debtor, have hard legal and economic realities constraining them in their discussions. The Debtor could find herself a Chapter 7 debtor, with a Chapter 7 trustee digging through all of her finances and dealings, including the LLC into which she transferred her interests in the orchard property days after the adverse verdicts came down in her litigation with Ms. Osmers.

The court continued the hearings on both the Motion to Dismiss and Order to Show Cause to 2:00 p.m. on July 29, 2021, to afford the parties to meet and confer, engage in constructive, good faith settlement negotiations, and hopefully come up with a resolution that can bring their long, expensive legal struggles to an end. On July 23, 2021, the Creditor and Debtor jointly requested continuance of the motion to September 30, 2021. On July 26, 2021, the court issued an order continuing the Motion to September 30, 2021.

The court shall conduct a brief status conference with David Johnston, Esq., counsel for the Debtor in Possession, and Valery Loumber, Esq., counsel for Ms. Osmers for a quick oral report on the progress and consider any oral motions for orders that would assist that process (including BDRP appointment if such assistance is deemed beneficial).

At the hearing, **XXXXXXXXXX**

REVIEW OF ORDER TO SHOW CAUSE

This Chapter 12 Case was commenced on October 29, 2020. It has been stated to the court that prior to filing this case, the Debtor, "acting through a family entity L & L Investments, LLC," grew almonds on property in western Stanislaus County. The Debtor is identified as a 50% member/owner of L & L Investments, LLC, and is the sole managing member of L & L Investments, LLC. Schedule A/B, Question 19; Dckt. 21. Debtor's sister, Lisa Jensen-Long, is the other 50% member/owner of L & L Investments, LLC. Declaration of Mark Jordan, CPA. Dckt. 44.

Bank of Stockton is identified as a creditor with three different loans made to L & L Investments, LLC, which total more than $1,600,000.00. Debtor states she personally guaranteed the three loans. The production line of creditor, for which there is owed $500,000.00, is secured by the L & L Investments, LLC's accounts, crops, crop proceeds, and "etc." Further, for the almonds sold, the processor pays the Bank of Stockton directly the proceeds from the sale of the almonds. Amended Status Report, Dckt. 34.

By Debtor's calculation on her Schedules, she has few, if any, assets that are not asserted to be fully encumbered or exempt.

A review of Debtor's Schedules shows two residential properties owned by Debtor, a law office checking account with a $25,000.00 balance, accounts receivable of $55,000.00, and Debtor's 50% interest in L & L Investments, LLC, with a value of $50,000.00, an interest in a condo in Mexico, and a timeshare interest in Maui as the Debtor's assets of significant value. Amended Schedule A/B, Dckt. 22.

On Amended Schedule D, Debtor lists the Briarwood Point property as having a value of $348,000.00 and being encumbered by a claim in the amount of ($195,420.00). Dckt. 22 at 15. No exemption is claimed in this property. For the Legend Drive property, Debtor's residence, a value of $477,000.00 is given, with there being debt of ($297,439.00) encumbering this property. *Id*. at 16. On Schedule C, Debtor claims an exemption of $175,000.00 pursuant to California Code of Civil Procedure § 704.730.

On Schedule I, Debtor lists income only from a law practice. Dckt. 21 at 27. The current law practice income is substantially less than reported on the Schedules for 2019 and 2018 gross income. On Form B 6I, Debtor states that she has the additional occupation of "almond grower" and is employed by L & L Investments, LLC, and has been so employed for seven years. *Id*. at 29. No income is shown for the employment by L&L Investments, LLC.

On Schedule J, Debtor states under penalty of perjury having reasonable and necessary monthly expenses, which results in there being a negative cash flow of ($4,979.00) per month. *Id*. at 31.

On the Statement of Financial Affairs, Debtor shows that her gross income from her business (the law practice) is unknown for 2020 (though this case was filed at the end of October 2020), and no farming income is shown for 2020. For both 2019 and 2018 Debtor lists having mid six-figure gross income from her law practice and mid six-figure gross income from farming operations. *Id*., 33-34.

The Chapter 12 Trustee filed his Status Conference Statement, in which he raised concerns over whether the financial information provided by Debtor under penalty of perjury established that Debtor could qualify as a "family farmer" for purposes of a Chapter 12 case. Trustee Status Report, Dckt. 36.

Upon review of the Schedules, Statement of Financial Affairs, the issues raised by the Chapter 12 Trustee, and responses from the Debtor in Possession, the court ordered the Debtor in Possession to file supplemental pleadings addressing this issue. The supplemental pleadings and other issues concerning the Schedules and Petition are addressed in the following section of this Order.

REVIEW OF PETITION, SCHEDULES, STATEMENT OF FINANCIAL AFFAIRS, AND SUPPLEMENTAL PLEADINGS FILED BY DEBTOR WHO IS SERVING AS THE DEBTOR IN POSSESSION

The Debtor in Possession was ordered to file supplemental pleadings addressing the Chapter 12 eligibility issues raised at the first Status Conference. Order, Dckt. 39. Two Declarations have been filed by the Debtor in Possession.

Both Declarations list the attorney of record in the upper left hand corner as David Johnston, Esq., who is the counsel for the Debtor in Possession in this case. Dckts. 43, 44.

The first Declaration is that of Mark Jordan, a CPA. Dckt. 44. He testifies to having done tax returns for the Debtor for decades, and states that all communications for the L & L Investments, LLC, have come from the Debtor, not from Lisa Jensen-Long, Debtor's sister. He also provides general recollections about capital accounts.

In providing this testimony under penalty of perjury, Mr. Jordan states that the testimony is based on his personal knowledge. Declaration, ¶ 1; Dckt. 44. He testifies that he has prepared tax returns for L & L Investments, LLC, since its inception in 2017. *Id*. ¶ 3. He testified that he has done tax returns for the Debtor since the late 1980's when she commenced her "sole proprietorship" (which appears to be her law practice). *Id*.

Mr. Jordan testifies that all directions for his work for L & L Investments, LLC, have come from the Debtor and that at no point has he been contacted by Lisa Jensen-Long, the other 50% owner/member of the L & L Investments, LLC. *Id*. ¶ 4. He testifies that he has prepared K-1's for Lisa Jensen-Long (and presumably for the Debtor), but he does not provide any copies of the K-1's for Lisa Jensen-Long or the Debtor.

Mr. Jordan's testimony provides little of substance and merely that he has some "recollection" of how the Debtor and Lisa Jensen-Long acquired the farm that is in the L & L Investments, LLC, and that he has never spoken or communicated with Lisa Jensen-Long.

The second Declaration is provided by Steven Schroeder, who states he has multiple degrees and certifications (including a law degree). He provides his conclusion that notwithstanding the terms of the L & L Investments, LLC, Agreement, that the two members of the L & L Investments, LLC, may agree to divide the assets or proceeds in a different manner. He further "testifies," without providing a basis, his legal conclusion that the members of the L & L Investments, LLC, have "agreed" to allocate 100% of the gross revenues to Debtor.

It appears that Mr. Schroeder's basis for this legal conclusion is that since the Debtor is the managing member, she is entitled to 100% of the L & L Investments, LLC. He concludes with an apparent legal opinion, stating;

> 9. In my opinion, the agreement to allocate 100% of the LLC's gross revenues [however, he does not direct the court to any such agreement or personal knowledge of such agreement] to [Debtor] is permitted by the operating agreement and is not prohibited.

Declaration, Dckt. 43.

Mr. Schroeder provided no evidence for his various conclusions and legal opinions stated to the court.

**Schedules, Statement of Financial Affairs,
and Requirements to Qualify as a Chapter 12
Family Farmer**

Bankruptcy being a statutory based area of the law, Congress provides a definition of what persons can qualify to be a Chapter 12 Debtor, stating in 11 U.S.C. § 109(f):

> (f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

The term "family farmer," as applies to an individual seeking relief under Chapter 12 of the Bankruptcy Code, is defined in 11 U.S.C. § 101(18) and (19) [emphasis added]:

> (18) The term "family farmer" **means**—
>
> (A) **individual** or **individual and spouse engaged in a farming operation** whose aggregate debts do not exceed $10,000,000 **and not less than 50 percent of whose aggregate noncontingent, liquidated debts** (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, **arise out of a farming operation owned or operated by such individual** or such individual and spouse, and **such individual** or such individual and spouse **receive from such farming operation more than 50 percent of such individual's** or such individual and spouse's **gross income** for—
>
> (i) the **taxable year preceding**; or
>
> (ii) each of **the 2d and 3d taxable years preceding**;
> the taxable year in which the case concerning such individual or such individual and spouse was filed; . . . .
>
> (19) The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.

The Chapter 12 Trustee has challenged Debtor's eligibility. Debtor in Possession's Counsel responds that Lisa Jensen-Long, the other 50% member/owner has agreed to have all of the gross income, and presumably all of the loss, from L & L Investments, LLC, allocated to the Debtor. No evidence of any such agreement or historic allocation has been provided to the court.

One of the disputed issues is what is Debtor's actual share of the gross income from L & L Investments, LLC, how that applies to determining eligibility to be a Chapter 12 debtor, and documentation that Debtor has received all income from the L & L Investments, LLC.

Information Provided on Schedules

The court has reviewed Debtor's Petition, Schedules, and Statement of Financial Affairs. It appears that there is some grossly inaccurate information stated in there by the Debtor, who is a licensed California attorney, and Debtor's counsel who filed (and presumably participated in the preparation, review of , and has given his Federal Rule of Bankruptcy Procedure 9011 certifications to) them.

On Amended Schedule A/B, Debtor does not list having any interest in or ownership of an unincorporated business with the name "Law Offices of Leslie F. Jensen." Dckt. 22 at 8-11. However, on Amended Schedule A/B, Debtor states that she has "Accounts receivable" owed to her personally, not to an entity named Law Offices of Leslie F. Jensen," with a value of $55,000.00. *Id*. at 11. Debtor also states that she has "Office equipment, computers, desks, chairs" that she owns, not some other entity, with a value of $9,500.00. *Id*.

Debtor's Income Information and
Non-Disclosure of Non-Debtor Spouse Income

In response to Question 46, Debtor states that she has no interest in "any farm- or commercial fishing-related property?" *Id*. at 9, and Amended Schedule A/B, Dckt. 22 at 11.

Going back to Amended Schedule I, Debtor states under penalty of perjury having no other income from any source, and Debtor states that her only income is the $5,500.00 in "gross wages, salary, and commissions" from her "Employer" Law Office of Leslie F. Jensen. Dckt. 21 at 27. Debtor has no income other than from her "employment" as a lawyer. Though stated as "gross wages, salary, and commissions," Schedule I states that there are no deductions from such "wages" for federal and state taxes, or Social Security tax.

No income is shown from the operation of any business by Debtor in response to Question 8 of Schedule I. *Id*. at 28.

On Form B6I attached to Schedule I, Debtor states that she is an "almond grower" who has been employed for seven years by L & L Investments, LLC. *Id*. at 29. No income from such employment by L & L Investments, LLC, is shown on Schedule I.

Debtor is married and disclosed in her Declaration in support of confirmation (Dckt. 71) that her husband suffered from a medical condition that required extensive surgery in 2019 which recovery reduced Debtor's ability to practice law.

On Schedule I, with respect to the income information for Debtor's non-debtor spouse, Debtor responds under penalty of perjury that it is "N/A," which the court construes to be an assertion that the required information to be disclosed is "not applicable" to Debtor. No basis is stated for such disclosure not being applicable to this Debtor.

On her Statement of Financial Affairs, Debtor states she is married. Dckt. 21 at 33. From the Expenses on Schedule J (*Id*. at 30-31), it appears that these are expenses for two persons.

Debtor has not disclosed any income, Social Security, pension, retirement, or any other income that her husband is receiving.

Debtor merely stating that disclosing this required information is "Not Applicable" is not a proper, good faith response under penalty of perjury.

Expense Information

On Schedule J, Debtor states under penalty of perjury that she has ($10,479.00) in necessary and reasonable monthly expenses. *Id*. at 30-31. These expenses of ($10,479.00) include:

1. Residence Property
    a. Mortgage Payment.....($2,416)
    b. Real Property Taxes.....($ 196)
    c. Homeowner's Ins.....($ 202)
    d. Maintenance & Upkeep.....($ 350)
2. Clothing and Laundry.....($ 600)
3. Personal Care Products & Services.....($ 210)
4. Non Residence Real Property
    (1) (Only Other Property Owned by Debtor the Alabama Property)
    b. Mortgage/Taxes/Ins.....($1,552)
    c. Maintenance.....($ 280)
    d. Alabama Home Expense.....($ 448)

Conspicuously absent from the income and expenses are any state or federal income taxes, self-employment taxes, Medicare, or Social Security payments.

On her Statement of Financial Affairs, Debtor states under penalty of perjury that she has two businesses and the gross income therefrom for 2020, the year the case was filed and the two preceding years, stated as follows:

Year	Gross Income From Operating Law Practice	Gross Income From Operating Farm
2020 (Jan - Oct Filing)	Unknown	Unknown
2019	$451,226	$486,671
2018	$396,058	$542,226

Id. at 33-34. No income information is provided for Debtor's non-debtor spouse, with those information fields left blank. *Id*.

In response to Question 27 on the Statement of Financial Affairs requiring the Debtor to provide details of her business or connections to any business, she states that one business is Law Office of Leslie F. Jensen and the other is L & L Investments, LLC. *Id*. at 27. While stating that she has these businesses, Debtor neglected to complete the required information identifying whether the businesses were sole proprietorship, self-employed, LLC, partnership, or interest in or officer of a corporation. While identifying L & L Investments, as an LLC, and listing a 50% interest on Schedule A/B, Debtor does not identify the nature of the "Law Office of Leslie F. Jensen." On her Amended Petition, in response to Questions 4 and 12, Debtor states that her business name is "DBA Law Office of Leslie F. Jensen" and that such operates as a sole proprietorship. Dckt. 58 at 2, 4. Based on the other information provided on the Schedules and in this case, this is Debtor's sole proprietorship, self-employed law practice.

While Debtor has represented having huge losses from the farming operation and may not owe income taxes, that does not excuse Debtor from paying self-employment, Social Security, and other taxes.

Status and Initial Confirmation Hearing Discussion

At the Status Conference and again at the April 29, 2021 initial hearing on the Debtor's Motion to Confirm the Chapter 12 Plan, the parties in interest continued to disagree that the Debtor qualified as a "family farmer." There is also now pending a Motion to Dismiss this Case for grounds other than Debtor not qualifying as a family farmer.

After discussion at the April 29, 2021 hearing, the court determined and the parties in attendance concurred that the issue of eligibility and the asserted grounds to dismiss or convert the case should be addressed before the parties engaging in extensive confirmation discovery.

Upon consideration of the information provided by Debtor under penalty of perjury, the issues concerning whether Debtor meets the requirements to be a debtor in a Chapter 12 case, and good cause appearing, the court issued the Order to Show Cause and requires the following:

a. On or before **May 27, 2021**, Leslie F. Jensen, the Debtor in Possession, shall file a Response, supported by credible, admissible (Fed. R. Evid) evidence and legal argument consistent with the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011 to establish her eligibility to be a Chapter 12 debtor in this bankruptcy case

.

b. On or before **June 3, 2021**, any party in interest may file Responses, supported by credible, admissible (Fed. R. Evid) evidence and legal argument consistent with the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011, to this Order to Show Cause and the Debtor in Possession's and the Debtor's (if any separate) Response.

c. On or before **June 10, 2021**, Debtor in Possession shall file and serve Replies, if any, to Responses filed by any non-debtor or non-debtor in possession party in interest.

The court further ordered that Debtor, Leslie F. Jensen, shall file amended Schedules and Statement of Financial Affairs to correct any incomplete, inaccurate, or non-reported information, including, without limitation, (1) disclosing the current income and the 2020 year to filing date, 2019, and 2018 gross income of her non-debtor spouse; (2) all tax payment obligations from her business or other income, including self-employment taxes and other taxes or amounts a self-employed person must pay even if Debtor does not have to pay income taxes, and (3) correctly stating her self-employment income as business income (not wages paid by a third-party employer) and include the required income and expense attachments for all businesses of the Debtor.

Additionally, that such financial information for income shall accurately state the actual income cash flow, and not merely an amount of "taxable income" that may exist after Debtor takes advantage of substantial losses from the L & L Investments, LLC, that she can use to reduce her taxable income.

Compliance with Order to Show Cause
by Debtor and Debtor in Possession

Debtor in Possession's counsel filed Debtor's declaration in response to the Order to Show Cause. Leslie Jensen testifies as follows (identified by paragraph number in the Declaration):

> 3. That Debtor's marriage to Michael Stout, identified as ex-husband, was on short duration and terminated effective June 11, 2021 "as to 'status only.'" the "short duration" is not disclosed, nor what is meant by the "status only" term, which may be one that family law attorneys are familiar with, but not all attorneys and judges.
>
> Further, when they were married, her "Ex Husband" had already retired from Modesto Irrigation District and was receiving payments on his pension plan and Social Security.
>
> She further testifies that she was not and is not familiar with his finances, but she filed joint tax returns which represent to the Internal Revenue Service and California Franchise Tax Board that the information in the returns she is signing is true and accurate.
>
> She testifies that they never have any joint accounts or credit obligations. However, their one "financial entanglement" was the purchase of a home in Alabama, which they own as joint tenants, and for which Debtor has made all the mortgage and expense payments.
>
> 4. Shortly after the Chapter 12 bankruptcy case was filed, Debtor filed for dissolution of the marriage in November 20, 2020.

[That a married couple would choose to dissolve a marriage when one of the spouses faced several financial struggles, whether because it had emotionally poisoned the marriage or to "protect" the existing and future assets of the non-debtor spouse and the two continued in their relationship without the existence of a marriage license, is not surprising or improper.]

> Debtor continues, stating that she has not given her Ex-Husband any assets and that "the dissolution of marriage was not to shield any of my assets from bankruptcy case."

[This appears to be a tacit acknowledgment that the bankruptcy was filed to protect the Ex-Husband's existing and future separate assets from the financial travails of Debtor.]

5. Debtor states that she has no information about the Ex-Husband's current income and they, the marriage now terminate as to "status only" are not filing joint tax returns.

9. To be transparent, Debtor states that she is now filing a Profit and Loss Statement for her law practice business and a copy of her Self-Employment tax return.

[As clearly stated on Schedule I, ¶ 8a; Dckt. 21, the Profit and Loss Statement for a debtor's business is required, not merely optional to make the financial disclosures more "transparent."]

10. Because of a $148,046 in farming operation losses, Debtor was not required to pay any federal or state income taxes.

Three Exhibits are provided by the Debtor/Debtor in Possession, which are authenticated in the Declaration. The First is the "Notice of Entry of Judgement (Status Only)." Dckt. 142 at 2. This Notice of Entry of Judgment (and not the actual judgment) states that a judgment was entered on June 15, 2021 for "Dissolution - status only." The boxes not checked on the form include: "Dissolution," "Dissolution - reserving jurisdiction over termination of marital status or domestic partnership;" "Legal separation." No other information is provided and this court cannot divine what is actually in that Judgment that Debtor relies upon.

The court's research turns up California Family Code § 2337 which is titled "§ 2337. Severance and grant of early trial on issue of dissolution of status of marriage; Preliminary declaration of disclosure." It provides in pertinent part:

> (a) In a proceeding for dissolution of marriage, the court, upon noticed motion, may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues.

Cal. Fam. Code § 2337(a). Other provisions of this section continuing spousal obligations and liabilities between the "status dissolution" parties.

Exhibit 2 is Debtor's 2020 Schedule C, Profit or Loss from Business for her law practice Dckt. 142 at 3-5. This was historical 2020 and not stated to be the Debtor's current, actual profit and loss business statement as of the October 29, 2020 filing of this case. Also, filing this Exhibit 2 does not comply with the requirements of Schedule I.

On Exhibit 2 Debtor states having $856,784 in gross income from her law practice. However, she lists here total expenses to be ($648,800), yielding only a 25% profit, which appears to be serious low for the risks and rewards of a law practice. Additionally, Debtor is not shackled to a large firm, but has a nimble solo practice in which she can squeeze her expenses to keep them legitimately low (but not over pay taxes). Debtor's 2020 legal expenses do include ($136,481), which appear to relate the judgment obtained by a creditor against Debtor.

Two other line items the court notes. First, for her solo practice, Debtor has wages of ($138,199) she pays, in addition to ($39,234) in contract labor. Second, Debtor has ($232,870) in other expenses that are listed on the attachment to the Schedule C, which include ($21,599) in expert witness fees, ($21,000) in "merchant fees," and ($10,000) in "credit card charges."

It appears that the financial and time drain from fighting the judgement that her creditor that obtained the judgment is over, 2021 and forward can be substantially greater financial years, with her law practice net profit rising to around $376,984, a modest 44% profit on her gross income. It does not appear that the stale 2020 information including expenses that clearly no longer will be incurred is accurate to state the going forward income that has to be considered by the court, the Chapter 12 Trustee, and creditors.

5. **20-90710-E-12** **LESLIE JENSEN** **CONTINUED STATUS CONFERENCE RE:**
21-9002 **David C. Johnston** **COMPLAINT**
2-1-21 [1]

OSMERS (MASELLIS) V. JENSEN ET AL

The Status Conference is continued to 2:00 p.m. on December 2, 2021.

SEPTEMBER 30, 2021 STATUS CONFERENCE

The Parties filed a Joint Status Report for the September 30, 2021 hearing. The Parties report that the use of the Bankruptcy Dispute Resolution Program was successful and all issues have been settled.

Unfortunately, the Status Report also discloses that counsel for the Defendant-Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor in her bankruptcy case is not authorized to practice law for the period late September 2021 through late November 2021.

It is suggested that the court continue the hearings and Status Conference in this Adversary Proceeding to a time after October 21, 2021, the anticipated hearing date on the Motion to Approve Compromise.

In light of the circumstances of this Adversary Proceeding and Bankruptcy Case, the hearing is continued.

SUMMARY OF COMPLAINT

The Complaint filed by Krista Osmers (Masellis) ("Plaintiff"), Dckt. 1, filed on February 1, 2021, begins with the statement that Leslie Jensen ("Defendant-Debtor") and L&L Investments, LLC filed a Petition for Relief under the Bankruptcy Code on October 29, 2020, Case No. 20-90710. That is the Chapter 12 bankruptcy case for Defendant-Debtor, but is not a bankruptcy case for L&L Investments, LLC ("Defendant LLC").

Plaintiff asserts having a claim arising from a marriage dissolution, with Plaintiff having been represented by Defendant-Debtor. It is asserted that when the representation was undertaken, Defendant-Debtor represented that she has sufficient errors and omissions insurance for the legal services to be provided.

The Complaint identifies specific conduct of Defendant-Debtor which is asserted to be improper and not providing Plaintiff with proper representation. Plaintiff identifies an action Plaintiff commenced

against Defendant-Debtor. Plaintiff states that she obtained a substantial judgment against Defendant-Debtor. After obtaining the judgment, it is alleged that Defendant LLC was created five days after the jury verdict came down in favor of Plaintiff and that Defendant-Debtor began transferring her assets into Defendant LLC.

Plaintiff alleges that her judgment against Defendant-Debtor has been affirmed on appeal and said judgment is now final, the California Supreme Court denying Defendant-Debtor's request to have the Supreme Court review the judgment.

Plaintiff alleges that Defendant-Debtor failed to properly tender Plaintiff's claim to her E&O carrier, and as such, has caused Plaintiff to be unable to seek payment for the judgment from such insurance. It is alleged that Defendant LLC was fraudulently formed as a shield for Defendant-Debtor to protect her assets from creditors.

Plaintiff seeks to have the obligations owed by Defendant-Debtor be determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B) and 11 U.S.C. § 523(a)(4). Compensatory and punitive damages are sought.

SUMMARY OF ANSWER

No Answers have been filed. The reissued summons was served on May 12, 2021, with answer or other responsive pleading not due until June 12, 2021.

SERVICE OF SUMMONS AND COMPLAINT

The Certificate of Service filed on May 12, 2021, Dckt.12, states that the Complaint, Reissued Summons, Adversary Cover Sheet, BDRP Notice, and Order to Confer were served on Defendant-Debtor, her Chapter 12 bankruptcy counsel, and the Chapter 12 Trustee on May 12, 2021, by U.S. Mail.

MAY 20, 2021 STATUS CONFERENCE

At the Status Conference Plaintiff's counsel discussed the Complaint and Reissued Summons having been served, and that the Answer would be due in late June 2021. He requested that the Status Conference be continued accordingly.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Leslie Jensen ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Status conference is continued to **2:00 p.m. on December 2, 2021.**

6. **20-90710-E-12** **LESLIE JENSEN** **CONTINUED MOTION TO DISMISS**
21-9002 **CVW-1** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

OSMERS (MASELLIS) V. JENSEN ET AL 6-14-21 [21]

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

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on June 11, 2021. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

Plaintiff previously testified that the court was sending notices in this matter to the wrong address, causing a failure in the service of process. Dckt. 13. Plaintiff asserts that he has since corrected the address error with the court. *Id*. The certificate of service shows that the Motion to Dismiss was served to Plaintiff's up-to-date mailing address. Dckt. 24.

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 2:00 p.m. on December 2, 2021.

Status Report Filed September 27, 2021; Dckt. 35

The Parties filed a Joint Status Report for the September 30, 2021 hearing. The Parties report that the use of the Bankruptcy Dispute Resolution Program was successful and all issues have been settled.

Unfortunately, the Status Report also discloses that counsel for the Defendant-Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor in her bankruptcy case is will be unable to practice law for the period late September 2021 through late November 2021.

It is suggested that the court continue the hearings and Status Conference in this Adversary Proceeding to a time after October 21, 2021, the anticipated hearing date on the Motion to Approve Compromise.

In light of the circumstances of this Adversary Proceeding and Bankruptcy Case, the hearing is continued.

REVIEW OF MOTION

Leslie F. Jensen ("Defendant-Debtor") moves for the court to dismiss all claims against it in Krista Osmers' ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. Non-dischargeability of debt obtained by fraud under § 523(a)(2); and

B. Non-dischargeability of debt obtained by defalcation while acting in a fiduciary duty under § 523(a)(4).

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 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")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. L&L is not the Debtor and not a party to the state court litigation resulting in a judgment;

B. The first claim for relief fails to plead fraud with particularity as required by Rule 9(b);

C. The alleged breach of fiduciary duty is simply a negligence claim.

DISCUSSION

First, Defendant-Debtor claims that although the Complaint names L&L as a Defendant, L&L is not a debtor in this case. Dckt. 21, ¶ 3. Defendant-Debtor points out that the state court judgment did not list L&L as a party, and Debtor's schedules did not identify L&L as a debtor. *Id*. Defendant-Debtor further argues that L&L is a corporate entity and as such cannot be denied discharge under 11 U.S.C. §§ 523(a)(2) and 523(a)(4), whose statutes apply specifically to "an individual debtor." In agreement with Defendant-Debtor's assertion, this court has previously held that the exceptions to discharge provisions of 11 U.S.C. § 523(a) apply only to individual debtors and not corporate debtors. *Glatzel v. Gordon's Music & Sound, Inc. (In re Gordon's Music & Sound, Inc.)*, Nos. 11-28452-E-11, 11-2483, 2012 Bankr. LEXIS 6133 (Bankr. E.D. Cal. Oct. 12, 2012).

Second, Defendant-Debtor contends that Plaintiff's 11 U.S.C. § 523(a)(2) claim for relief fails to meet the heightened standard of pleading for causes of action based on fraud. Federal Rule of Civil Procedure 9(b), made applicable by Federal Rule of Bankruptcy Procedure 7009, requires a party to state with particularity the circumstances constituting fraud.

Plaintiff alleges a specific type of fraud under 11 U.S.C. § 523(a)(2)(B), which requires the "use of a statement in writing – (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied." Complaint, dckt. 1, ¶ 28. Defendant-Debtor argues that the Complaint does not allege what written financial statement was given by Debtor to Plaintiff, "probably because none exist." Motion, dckt. 21, ¶ 8. Plaintiff alleges that Defendant-Debtor made two fraudulent statements on which Plaintiff relied to her detriment: first, when Defendant-Debtor served as Plaintiff's counsel in a divorce proceeding and represented

that Defendant-Debtor had sufficient errors and omissions insurance to cover any damages resulting from malpractice; and second, when Plaintiff sued Defendant-Debtor in state court, and Defendant-Debtor continued to misrepresent to Plaintiff that her insurer would cover any judgment entered against her up to her policy limits. Dckt. 1, ¶¶ 12 & 19.

Without further elaboration of the facts by Plaintiff, who has not opposed the instant Motion, the court concludes that these allegations fail to state a claim for fraud under 11 U.S.C. § 523(a)(2)(B). Namely, Plaintiff has not alleged that the statements regarding Defendant-Debtor's malpractice insurance were made in writing, a plain requirement of the statute.

Defendant-Debtor also asserts that the Superior Court expressly dismissed the cause of action for fraud. Dckt. 21, ¶ 11. However, neither a copy of the judgment nor an order dismissing the fraud claim could be located in the docket.

Thirdly, Defendant-Debtor opposes Plaintiff's second claim for relief on the grounds that the alleged breach of fiduciary duty is simply a negligence claim. Plaintiff's claim is based on 11 U.S.C. § 523(a)(4), which denies discharge for any debt stemming from "fraud or defalcation while acting in a fiduciary duty." Federal Rule of Civil Procedure 9(b)'s heightened pleading standard is also applicable to claims of fraud brought under § 523(a)(4). *See In re Halversen*, 330 B.R. 291, 301 (Bankr. M.D. Fla. 2005). The Complaint states that the "debts and money extended and/or received by Plaintiff were the direct result of the fraudulent and/or defalcation conduct [of Defendant-Debtor] while acting as a fiduciary." Dckt. 1, 31. Since Plaintiff has alleged fraud *or* defalcation while acting in a fiduciary capacity, F.R.C.P. is relevant insofar as the court addresses the claim of fraudulent conduct in a fiduciary role.

Defendant-Debtor asserts that Plaintiff has not pled fraud or breach of fiduciary duty with sufficient particularity, and that any issues of fraud have already been litigated in the Superior Court in Defendant-Debtor's favor. Dckt 21, ¶¶ 12 & 13. Defendant-Debtor has not filed exhibits or cited to properly authenticated evidence for the court to adjudicate this claim. The court cannot determine whether *res judicata* bars Plaintiff from re-litigating the issue of fraud without evidence of the judgment.

Defendant-Debtor also argues that legal malpractice claims based on both negligence and breach of fiduciary duty are duplicative where the claims arise from the same facts; and therefore the claim for breach of fiduciary duty should be dismissed. *Id.*, ¶ 4. However, the case cited by Defendant-Debtor as authority for this argument, *Broadway Victoria, LLC v, Norminton, Wiita & Fuster et al.*, 217 Cal.Rptr.3d 414 (2017), was ordered de-published by the California Supreme Court under Rule 8.1125(c)(2) of the California Rules of Court. *Afont v. Poynter Law Grp.*, No. SACV 17-01388 JVS (KESx), 2018 U.S. Dist. LEXIS 224026, at *20 (C.D. Cal. Nov. 5, 2018). Therefore, the court may not consider it under California Rule of Court 8.1115(a). Nonetheless, there is substantial extra-jurisdictional precedent supporting Defendant-Debtor's argument, with numerous courts outside of California holding that claims for breach of fiduciary duty should be dismissed as duplicative of legal malpractice claims that arise from the same operative facts. *See Afont*, 2018 U.S. Dist. LEXIS 224026, at *18 for an overview of the case law.

Next, Defendant-Debtor cites to *Bullock v. BankChampaign, N.A.*, for the proposition that "the type of debt covered by § 523(a)(4) requires moral turpitude and scienter." Dckt. 21, ¶ 16. In addition to misspelling the name of the case as *Bullard* instead of *Bullock*, Defendant-Debtor also misstates the Supreme Court's holding in that case. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273, 133 S. Ct. 1754, 1759 (2013) ("[W]here the conduct at issue *does not* involve bad faith, *moral turpitude*, or other immoral conduct, the term [defalcation] requires an intentional wrong" (emphasis added).

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

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

The Motion to Dismiss Adversary Proceeding filed by Leslie Jensen ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss Adversary Proceeding is continued to **2:00 p.m. on December 2, 2021.**

7. 20-90349-E-11 R. MILLENNIUM TRANSPORT, INC.

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
5-15-20 [1]

The Status Conference is xxxxxxx

SEPTEMBER 30, 2021 STATUS CONFERENCE

Through a Status Report in an unrelated adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period late September 2021 through late November 2021.

At the Status Conference, xxxxxxx

APRIL 29, 2021 STATUS CONFERENCE

The court Order confirming the Subchapter V Plan in this case was entered on February 11, 2021. Dckt. 133. No post-confirmation status report was filed by the Debtor who administering the confirmed plan.

At the Status Conference, counsel for the Debtor reported that they are working on the mechanics on making the payments under the Plan since not all classes affirmatively voted to accept the Plan.

The Trustee noted that while the Plan does not provide for the Trustee to make the payment, under operation of Subchapter V the Trustee will do so, except for the direct electronic payments already being made pursuant to prior adequate protection orders.

8. 21-90378-E-11 MOBREWZ, LLC

STATUS CONFERENCE RE: VOLUNTARY PETITION 8-18-21 [1]

The Status Conference is xxxxxxx

SEPTEMBER 30, 2021 STATUS CONFERENCE

Through a Status Report in an unrelated adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period from late September 2021 through late November 2021.

The Debtor/Debtor in Possession filed a Status Report on September 17, 2021. Dckt. 22. In it the Debtor/Debtor in Possession recounts the current status of the business and the difficulties in updating the facilities and getting the business open due to COVID-19 issues.

It is projected in the Report that the Debtor/Debtor in Possession will have a Chapter 11 plan filed on or before November 15, 2021, which is the 90th day after the filing of the Plan. Given counsel for the Debtor/Debtor in Possession disruption of his legal practice, such appears to be in question.

The Trustee's report of the First Meeting of Creditors states that the Debtor/Debtor in Possession appeared and counsel for the Debtor/Debtor in Possession appeared at the Meeting on September 22, 2021. September 23, 2021 Trustee Docket Entry Report. The First Meeting has been continued to October 7, 2021.

At the Status Conference, xxxxxxx

9. 20-90779-E-11 PRIMO FARMS, LLC

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 12-3-20 [1]

The Status Conference is xxxxxxx

SEPTEMBER 30, 2021 STATUS CONFERENCE

Through a Status Report in an unrelated adversary proceeding, the court has learned that counsel for the Debtor has been diagnosed with COVID-19 and has been hospitalized. Also, that counsel for Debtor will be unable to practice law for the period from late September 2021 through late November 2021.

At the Status Conference, xxxxxxx

10. 19-90382-E-7 TRACY SMITH
19-9012
ALVAREZ V. SMITH ET AL

CONTINUED POST-JUDGMENT STATUS CONFERENCE RE: COMPLAINT
7-26-19 [1]

The Post Judgment Status Conference is xxxxxxx

SEPTEMBER 30, 2021 POST-JUDGMENT STATUS CONFERENCE

Neither party has filed a Status Report for the September 30, 2021 Status Conference. At the Status Conference, **xxxxxxx**

July 29, 2021 Post-Judgement Status Conference

No further pleadings or status reports have been filed by Plaintiff. At the Status Conference, counsel for Plaintiff reported that counsel for Plaintiff reported that Defendant-Debtor has new counsel, but he has not been able to meet with him. The Parties requested that the Status Conference be continued.

June 3, 2021 Post-Judgment Status Conference

By Judgment entered May 26, 2020, the court granted Plaintiff Tina Alvarez a nondischargeable monetary judgment for $19,000.00 and a mandatory injunction for Defendant Tracy Smith and Defendant Sharp Corporation to transfer title to a mobile home, together with improvements to Plaintiff. Judgement, Dckt. 48. The court provided alternative relief in the form of a monetary judgment in the amount of $93,643.84 which Plaintiff could request if the Defendants failed to comply with the mandatory injunction and Plaintiff believes that such injunctive relief cannot be consummated.

The court scheduled this Post-Judgment Status Conference as part of its file management to determine whether the file may be closed or that a party will be seeking further relief from the court.

Plaintiff filed a Status Report on May 24, 2021. Dckt. 53. Plaintiff advises the court that the Defendants have not complied with the mandatory injunction, nor have they paid the $19,000.00 monetary damages awarded.

Plaintiff requests that the court continue the Status Conference 60 days, by which time Plaintiff will request an amended judgment or advise the court how Plaintiff is diligently prosecuting this judgment so the court can decide whether to keep this file open or close it.

FINAL RULINGS

11. 19-90751-E-7 KAMALDIP DHAMI
19-9021
WILMINGTON TRUST, NATIONAL ASSOCIATION V. DHAMI

ORDER TO SHOW CAUSE WHY ADVERSARY PROCEEDING SHOULD NOT BE DISMISSED
7-9-21 [25]

Final Ruling: No appearance at the September 30, 2021 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Defendant-Debtor; U.S. Trustee; Attorney for the Chapter 7 Trustee as stated on the Certificate of Service on July 9, 2021. The court computes that 83 days' notice has been provided.

The court issued an Order to Show Cause based on why the Adversary Proceeding should not be dismissed.

The Order to Show Cause is discharged.

On July 8, 2021, the Parties filed a Notice of Settlement in the Adversary Proceeding. Dckt. 21. Additionally, the Parties filed a Motion to Dismiss the Adversary Complaint, which is to be heard the same date as this hearing, September 30, at 10:30 am. Dckt. 27. Given the Parties mutually agreeable resolution of the issues in the Adversary Proceedings, an Order to Show Cause is no longer necessary.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

12. 19-90464-E-7 RICHARD RICKS
20-9013
EDMONDS V. HUGHES

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT FOR RECOVERY OF VOIDABLE AND/OR FRAUDULENT TRANSFER
11-19-20 [1]

Final Ruling: No appearance at the September 30, 2021 Pre-Trial Conference is required.

The Pretrial Conference is continued to 2:00 p.m. on January 27, 2022.

SEPTEMBER 30, 2021 PRETRIAL CONFERENCE

The court has continued the Status Conference on the Motion for Summary Judgment to 2:00 p.m. on January 27, 2022, to allow the Parties to conclude their settlement discussions, documentation of the settlement, and resolution of this Adversary Proceeding.

In the Richard Ricks Chapter 7 case, 19-90464, the court has issued an order approving the compromise between Plaintiff-Trustee and Defendant. 19-90464; Order, Dckt. 133. Under the terms of the settlementm Plaintiff-Trustee "shall be entitled to obtain a judgment in the principal amount of $127,681.89 plus interest at the legal rate of interest in California. In addition, the real property in dispute is to be transferred from Defendant to Plaintiff-Trustee, who will sell the property, pay all expenses, liens, and property taxes, and apply the net proceeds to Defendant's obligation under the settlement. The settlement further provides that Defendant will make an initial payment of ($5,000) by May 30, 2021, and then $1,000 a month for 24 months, with such payments totaling $29,000.

The settlement provides that if Defendant conveys the property and makes the $29,000 in payments, the Plaintiff-Trustee will dismiss this Adversary Proceeding with prejudice. If Defendant defaults in the transfer or payments, after providing specified notice and no cure by Defendant-Debtor of the default, the Trustee may have the judgment entered against Defendant.

The Plaintiff-Trustee not having filed a motion for entry of judgment and no further pleadings having been filed in this Adversary Proceeding, it appears that performance under the settlement is being made by Defendant.

The court continues the Pre-Trial Conference to the same date and time as the Status Conference on the Motion for Summary Judgment.

May 20, 2021 Pretrial Conference

On March 25, 2021, the court conducted oral argument on the Motion for Summary Judgment filed by the Plaintiff-Trustee. The court took the matter under submission, and as stated in the order, would delay for a short period of time issuing a ruling thereon to allow the Parties to address some areas of common ground that were discussed at the hearing.

Subsequent to the hearing, the respective counsel for the Parties notified the Courtroom Deputy for Department E that they were engaging in constructive settlement discussions and requested that the court delay issuing the ruling while their discussions continued.

On April 9, 2021, the court issued an order (Dckt. 36) setting this May 20, 2021 Settlement Status Conference to have a clear marker of whether the ruling on the Summary Judgment Motion would be necessary or if the Parties have the matter resolved. Additionally, if the parties have a "sticking point," the Settlement Status Conference would allow for discussion thereof.

As provided in the Settlement Conference Order, no status reports or attendance at the hearing is required if the Parties have not resolved this matter. If no appearances are made or there is not otherwise documentation of a settlement, the court will proceed with issuing a ruling on the Motion for Summary Judgment.

At the Settlement Status Conference, counsel for the Defendant reported that this Adversary Proceeding has been settled, with it being documented on May 10, 2021. Counsel for the Plaintiff Trustee is preparing a motion to approve settlement.

13. 10-90281-E-7 LORRAINE/GARY ERWIN
21-9005
ERWIN ET AL V. U.S. BANK, NATIONAL ASSOCIATION ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-24-21 [1]

Final Ruling: No appearance at the September 30, 2021 Status Conference is required.

The Status Conference is continued to 10:30 a.m. on October 21, 2021 (specially set time).

SEPTEMBER 30, 2021 STATUS CONFERENCE

On September 9, 2021, Plaintiff-Debtor filed a Motion for entry of default judgment with an affidavit page attached at the end. Dckt. 23. Supporting pleadings include a proposed judgment. Exhibits, Dckt. 24. Hearing on the Motion is set for 10:30 a.m. on October 21, 2021. Notice, Dckt. 25

The court continues the Status Conference to have it conducted in conjunction with the hearing on the Motion for Entry of Default Judgment.