UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: OCTOBER 16, 2019
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

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

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

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

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

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

1. 18-13501-A-7 **IN RE: JUAN RAYGOZA-PEDROZA AND SYLVIA PORRAS-RAYGOZA**
18-1084

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-30-2018 [1]

MOORADIAN V. RAYGOZA-PEDROZA
ET AL
MELISSA MOORADIAN/ATTY. FOR PL.
DISMISSED 8/15/19; CLOSED 9/6/19

Final Ruling

This case was dismissed, the Status Conference is concluded.

2. 19-11901-A-7 **IN RE: ARMANDO CRUZ**
19-1095

STATUS CONFERENCE RE: COMPLAINT
8-12-2019 [1]

STRATEGIC FUNDING SOURCE, INC.
V. CRUZ
JARRETT OSBORNE-REVIS/ATTY. FOR PL.

Final Ruling

The status conference is continued to November 12, 2019, at 10:00 a.m. If a judgment or dismissal is not in the file, not later than 7 days prior to the continued status conference the plaintiff shall file a status report.

3. 18-13935-A-7 **IN RE: NICOLAS QUIROZ**
19-1093

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-29-2019 [1]

QUIROZ V. UNITED STATES
DEPARTMENT OF EDUCATION ET AL
JEFFREY MEISNER/ATTY. FOR PL.
REISSUED SUMMONS FOR 12/18/19

Final Ruling

The Status Conference is continued to December 18, 2019 at 10:00 a.m.

4. 19-12047-A-7 **IN RE: ROBERT FLETCHER**
19-1097

STATUS CONFERENCE RE: COMPLAINT
8-19-2019 [1]

FLETCHER V. FLETCHER ET AL
DAVID JENKINS/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The Status Conference is continued to December 18, 2019 at 10:00 a.m.

5. 18-11471-A-7 **IN RE: ARTURO/MARIA DE LOS ANGELES MACIAS**
18-1036

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
11-7-2018 [47]

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

Final Ruling

The status conference is continued to January 8, 2020, at 10:00 a.m.

6. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1062

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-14-2019 [16]

PARKER V. CASTELLUCCI
DANIEL EGAN/ATTY. FOR PL.

No Ruling

7. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1062 WJH-4

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-12-2019 [38]

PARKER V. CASTELLUCCI
MICHAEL WILHELM/ATTY. FOR MV.

Tentative Ruling

Motion: Dismiss First Amended Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted with leave to amend
Order: Civil minute order

Defendant Jason Castellucci ("Castellucci") moves to dismiss Randell Parker's ("Parker") First Amended Complaint. Parker opposes the motion.

HISTORY

In 2017, Don Rose Oil Company, Inc., sought chapter 11 protection. Soon thereafter, the case was converted to chapter 7. Parker was named the trustee.

Just short of the two-year anniversary of the commencement of the case, Parker filed an adversary proceeding against Castellucci alleging preferential and fraudulent transfers. 11 U.S.C. §§ 547, 548(a)(1)(B), 544(b), 550. The complaint was phrased as legal conclusions exclusive of three facts: (1) the defendant was Jason Castellucci; (2) in 2016 and 2017 he received transfers for "payroll"; and (3) the transfers aggregated $55,714. Complaint ¶¶ 2, 8, 31 and Exh. A, June 10, 2019, ECF # 1.

Castellucci filed a Rule 12(b)(6) motion, arguing that Parker had insufficiently pled facts demonstrating that Parker's claim against him was "plausible," as required by *Iqbal* and *Twombly*. Before the motion could be heard but after the two-year anniversary of the case, Parker filed his First Amended Complaint.

The First Amended Complaint also alleged preferential and constructively fraudulent transfers. 11 U.S.C. §§ 547, 548(a)(1)(B), 544(b) (incorporating Cal. Civ. Code § 3439.04(a)(2)), 550. And like the original complaint, it is phrased predominantly as legal conclusions. It does plead the following facts: (1) John Castellucci was president of Don Rose Oil at the time it filed for chapter 11 protection; (2) Jason Castellucci is a relative of John Castellucci; (3) aggregate "payroll" transfers in 2016 and 2017 to Jason Castellucci were $55,714; (4) when the transfers were made Don Rose Oil was insolvent "in part because [it] had no going concern value" and "[a]s a result . . . took more and more expensive financing, including from a merchant cash advance lender"; and (5) the Statement of Financial Affairs signed by John Castellucci did not describe consideration for transfers "other than vague

indications that some of the payments are for employee compensation." First Amended Complaint ¶¶ 2, 8 10, 22 and Exh. A, August 14, 2019, ECF # 16.

Castellucci has filed a Rule 12(b)(6) motions addressed to the First Amended Complaint, arguing (1) insufficiency of the facts under *Iqbal* and *Twombly*; and (2) that the two-year statute of limitations, 11 U.S.C. § 546(a)(1)(A), has expired and that the First Amended Complaint does not relate back because the complaint was devoid of facts sufficient to put him on notice.

LAW

Relation Back

As a rule, an amended complaint relates back in time to the date of the original complaint. Accordingly, an amended complaint will be deemed to "relate back" to the date of the original complaint and is not time barred, notwithstanding the intervening expiration of the statute of limitations. *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857-58 (9th Cir. 2011).

As to existing parties, the relate-back rules apply only if the claim in the amended complaint (1) arises out of the same "conduct, transaction or occurrence" as pled in the original complaint. *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325 (9th Cir. 1989) ("a common core of operative facts"); and (2) the original complaint puts the defendant on "notice" of the nature of the claim raised in the amended complaint. *ASARCP, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (2014); *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006); see also, Phillips & Stevenson, *Federal Civ. Proc. Before Trial, Calif. & 9th Cir. Editions*, Pleadings, Amended and Supplemental Pleadings § 8:1606 (The Rutter Group 2019).

Rule 12(b)(6)

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

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

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

DISCUSSION

Statute of Limitations

Absent extension, the statute of limitations for avoidance actions ran in this case on or about June 22, 2019. 11 U.S.C. § 546(a)(1)(A). The First Amended Complaint was filed August 14, 2019.

But the First Amended Complaint will be deemed timely if it "relates back" to the original complaint, which was filed June 10, 2019. Here, the First Amended Complaint satisfies both requirements to relate back. First, both pleadings allege rights arising out of the "conduct, transaction or occurrence." These rights arise, if at all, out of transfers described as "payroll," whether no-show or otherwise, aggregating $55,714 paid in 2016 and 2017. Second, the original complaint gave thin but sufficient notice of the "nature" of the claim, i.e., preferential and/or fraudulent transfers, S*antamarina*, 466 F.3d at 573, and the "facts" on which it was based, i.e. payments described as "payroll" in 2016 and 2017 aggregating $55,714. *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 962 (10th Cir. 2012). Accordingly, the First Amended Complaint is timely.

Sufficiency of the First Amended Complaint

Were the monies paid to Jason Castellucci for wages, were they commensurate with the services rendered, and were they paid in the ordinary course of business?

To prevail in this adversary proceeding Parker must plead and provide that those monies fall outside that framework. As to the pleading requirement, trustee Parker must show a plausible claim that the transfers to Castellucci were something beyond regular wages timely paid. Such a plausible claim requires well-pleaded facts, exclusive of conclusions, showing that the plaintiff is entitled to relief. *Twombly*, 550 U.S. at 556. Plausibility means showing that entitlement to relief is more than speculative. *Id.* But the showing need not rise to the level of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002); *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

Moreover, Ninth Circuit authority suggests that a plaintiff must plead facts supporting each element of the claim pled. *Johnson v. Riverside Healthcare System*, LP, 534 F3d 1116, 1122 (9th Cir. 2008),

(plaintiff must at least "allege sufficient facts to state the elements of … [his or her] claim").

Preference

An avoidable preference is one that improves a creditor's lot made on the eve of bankruptcy.

> Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--(1) to or for the benefit of a creditor; (2) for or on account of an **antecedent debt** owed by the debtor before such transfer was made; (3) made **while the debtor was insolvent**; (4) **made**--(A) on or within 90 days before the date of the filing of the petition; or (B) **between ninety days and one year before the date of the filing of the petition**, if such creditor at the time of such transfer was an insider; and (5) **that enables such creditor to receive more than such creditor would receive if--(A) the case were a case under chapter 7 of this title**; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (emphasis added).

Here, the facts and reasonable inferences therefrom do not support a finding of a plausible claim as to the following elements: (1) the existence of an antecedent debt, see First Amended Complaint ¶ 9 (describing a legal conclusion "The Transfers were on account of an antecedent debt owed by Debtor to Defendant before the transfer was made."); (2) insolvent, *compare* 11 U.S.C. § 101(32) *with* First Amended Complaint ¶ 10 (also describing a legal conclusion "At the time of the Transfers, Debtor was insolvent. Debtor's assets at all times during the period one year before the bankruptcy were worth less than the amount of its liabilities. . ."); (3) that the transfer occurred within one year of the petition, see First Amended Complaint Exh. A (indefinite in comparison to petition date of June 22, 2017, "2016 and 2017 Payroll"); and (4) the defendant received more than he would have received under Chapter 7, see First Amended Complaint ¶ 11 (also describing a legal conclusion, "The Transfers enable Defendant to receive more than he would have received under Chapter 7 of the Bankruptcy Code if the Transfers had not been made because if the Transfers had not been made, Defendant would have been an unsecured creditor and unsecured creditors will receive les than 100% of their claims in this Chapter 7 case.").

Fraudulent transfer

Constructively fraudulent transfers occur when the debtor is insolvent, insufficiently capitalized or experiencing cash flow problems.

> (a)(1) The trustee may avoid any transfer . . or any obligation (including any obligation to or for the

> benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . .
>
> (B)(i) **received less than a reasonably equivalent value in exchange** for such transfer or obligation; and
>
> > (ii)(I) was **insolvent** on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> >
> > > II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which **any property remaining with the debtor was an unreasonably small capital**;
> > >
> > > (III) intended to incur, or believed that the debtor would incur, **debts that would be beyond the debtor's ability to pay as such debts matured**; or
> > >
> > > (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 USC § 548 (emphasis added).

This case is remarkably similar to a recent decision by the Ninth Circuit Bankruptcy Appellate Panel, *Sharp v. Intracoastal Capital, LLC*, 2019 WL 4929933 (9th Cir. October 2, 2019). There the panel considered the *Iqbal* and *Twombly* plausibility pleading requirements in the context of constructively fraudulent transfers and upheld the trial court's decision granting a Rule 12(b)(6) motion. The panel described the pleading requirements for the "balance sheet test," "inadequate capital test," and "cash flow test" and found far more detailed pleadings than those in trustee Parker's First Amended Complaint lacking. For example, there the trustee attempted to allege balance sheet insolvency:

> ¶ 43. Apart from being cash-flow insolvent, BEI was also balance sheet insolvent at the time of the Transfers or became insolvent as a result thereof. Despite the company's disclosures during the relevant timeframe, its financial statements contained various accounting errors that resulted in a grossly overstated value of the company's assets. For example, BEI accounted for non-binding letters of intent on unfunded renewable energy projects as assets worth millions of dollars;
>
> ¶ 53. As noted above, BEI was insolvent at the time of the Transfers or became insolvent as a result thereof. It no longer had the ability to pay debts as they came due and the value of its liabilities exceeded its actual assets;

Id. at * 3.

Finding this to be insufficient fact pleading under *Iqbal* and *Twombly*, the court stated:

> We see no error here. The [First Amended Complaint] failed to articulate any amounts for BEI's assets and liabilities or allege that the overstated assets caused BEI's liabilities to exceed its assets. See *Harlan Cty. Mining, LLC v. Wrigley's 7–711, Inc. (In re Licking River Mining, LLC)*, 572 B.R. 830, 844 (Bankr. E.D. Ky. 2017) (while complaint alleged financial difficulties and identified prepetition debts, it failed to "comparably allege the value of Debtors' assets to demonstrate Debtors' insolvency.").

Id. at * 6.

Here, the pleadings are conclusions, not facts. The trustee has pled:

> The Debtor was insolvent on the date[s] the payment[s] constituting the Transfers were made.
>
> The Debtor was engaged in business for which any of the remaining property was unreasonably small capital.
>
> The Debtor intended to incur, or believed it would incur, debts beyond its ability to pay as such debts became due.

First Amended Complaint ¶¶ 15-17, August 14, 2019, ECF # 16.

These are legal conclusion, not facts. *Sharp v. Intracoastal Capital, LLC*, 2019 WL at * 6-9. The motion will be granted.[1]

LEAVE TO AMEND

As *Intracoastal Capital, LLC* reminds us, leave to amend should be freely granted.

> Civil Rule 15(a), applicable here by Rule 7015, provides that leave to amend should be "freely" granted "when justice so requires." We consider five factors to assess whether the trial court properly granted or denied leave to amend pleadings: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended the complaint. The Ninth Circuit has consistently held that a trial court abuses its discretion in denying leave to amend unless the court "'determines that the pleading could not possibly be cured by the allegation of other facts,'" or "if the plaintiff had several

[1] The Third Cause of Action, 11 U.S.C. § 544(b), incorporating Cal. Civ. Code § 3439.04(a)(2) suffers similar maladies.

> opportunities to amend its complaint and repeatedly failed to cure deficiencies." An amendment is futile when it is clear that amendment would not have remedied the complaint's factual deficiencies.

Id. at 10 (internal citations omitted).

Mindful of these factors, the court will allow the trustee one last opportunity to plead his case. Here, the first three elements described by *Intracoastal Capital, LLC* are not present. As to the fourth element, the court doubts that the trustee can remedy the shortcomings but cannot yet say an attempt would be futile. Finally, though the plaintiff has twice unsuccessfully attempted to plead preference and fraud, *Intracoastal Capital, LLC* reminds us of the need to give the plaintiff a full opportunity to plead its case. For these reasons, the court will grant trustee Parker one final opportunity to plead an avoidance action.

CONSENT/NON-CONSENT TO FINAL ORDERS AND JUDGMENTS

Effective December 1, 2016, Rule 7008 requires the plaintiff to plead affirmatively consent, or non-consent to the entry of final orders and judgments by this court.

> Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. **In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.**

Fed. R. Bankr. P. 7008 (emphasis added).

Post *Stern v. Marshall*, 564 US 462 (2011), Rule 7008 was amended to delete references to pleading whether a matter is core and add the consent/non-consent requirement.

Neither the complaint, nor the First Amended Complaint, appears to comply with Rule 7008. Each pleads that this is a core proceeding. While formerly the rule, this requirement is no longer applicable and complaints must plead that the plaintiff consents or does not consent to final orders and judgments by this court.

CIVIL MINUTE ORDER

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

Defendant Jason Castellucci's motion has been presented to the court. Having considered the motion to dismiss, opposition, and reply thereto, if any,

IT IS ORDERED that the motion is granted with leave to amend.

IT IS FURTHER ORDERED that plaintiff Randell Parker may file and serve his Second Amended Complaint no later than November 6, 2019. Any amended complaint shall address the issues raised by the court in this ruling that are applicable to the claims in the Second Amended Complaint and be accompanied by a redline copy showing all amendments, modifications and/or deletions.

IT IS FURTHER ORDERED that defendant Jason Castellucci may file an answer or other appropriate response to the amended complaint no later than December 4, 2019.

IT IS FURTHER ORDERED that if defendant Jason Castellucci files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on January 8, 2019 at 10:00 a.m.

IT IS FURTHER ORDERED that the parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence. In the event that defendant Jason Castellucci fails to file an answer or motion within the time specified in this order, plaintiff Randell Parker shall forthwith and without delay seek the entry of the defendant's default.

IT IS FURTHER ORDERED that plaintiff Randell Parker shall comply with Federal Rule of Bankruptcy Procedure 7008.

8. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1063

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-14-2019 [16]

PARKER V. CASTELLUCCI
DANIEL EGAN/ATTY. FOR PL.

Final Ruling

The Status Conference is continued to November 12, 2019 at 10:00 a.m.

9. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1063 WJH-4

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-12-2019 [38]

PARKER V. CASTELLUCCI
MICHAEL WILHELM/ATTY. FOR MV.

Final Ruling

The Motion is continued to November 12, 2019 at 10:00 a.m.

10. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1064

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-14-2019 [16]

PARKER V. CASTELLUCCI
DANIEL EGAN/ATTY. FOR PL.

No Ruling

11. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1064 WJH-4

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-12-2019 [37]

PARKER V. CASTELLUCCI
MICHAEL WILHELM/ATTY. FOR MV.

Tentative Ruling

Motion: Dismiss First Amended Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted with leave to amend
Order: Civil minute order

Defendant Linda Castellucci ("Castellucci") moves to dismiss Randell Parker's ("Parker") First Amended Complaint. Parker opposes the motion.

HISTORY

In 2017, Don Rose Oil Company, Inc., sought chapter 11 protection. Soon thereafter, the case was converted to chapter 7. Parker was named the trustee.

Just short of the two-year anniversary of the commencement of the case, Parker filed an adversary proceeding against Castellucci alleging preferential and fraudulent transfers. 11 U.S.C. §§ 547, 548(a)(1)(B), 544(b), 550. The complaint was phrased as legal conclusions exclusive of three facts: (1) the defendant was Linda Castellucci; (2) in 2016 and 2017 he received transfers for "payroll"; and (3) the transfers aggregated $57,625.00. Complaint ¶¶ 2, 8, 31 and Exh. A, June 10, 2019, ECF # 1.

Castellucci filed a Rule 12(b)(6) motion, arguing that Parker had insufficiently pled facts demonstrating that Parker's claim against him was "plausible," as required by *Iqbal* and *Twombly*. Before the motion could be heard but after the two-year anniversary of the case, Parker filed his First Amended Complaint.

The First Amended Complaint also alleged preferential and constructively fraudulent transfers. 11 U.S.C. §§ 547, 548(a)(1)(B), 544(b) (incorporating Cal. Civ. Code § 3439.04(a)(2)), 550. And like the original complaint, it is phrased predominantly as legal conclusions. It does plead the following facts: (1) John Castellucci was president of Don Rose Oil at the time it filed for chapter 11 protection; (2) Linda Castellucci is a relative of John Castellucci; (3) aggregate "payroll" transfers in 2016 and 2017 to Linda Castellucci were $57,625.00; (4) when the transfers were made Don Rose Oil was insolvent "in part because [it] had no going concern value" and "[a]s a result . . . took more and more expensive financing, including from a merchant cash advance lender"; and (5) the Statement of Financial Affairs signed by John Castellucci did not describe consideration for transfers "other than vague

indications that some of the payments are for employee compensation." First Amended Complaint ¶¶ 2, 8 10, 22 and Exh. A, August 14, 2019, ECF # 16.

Castellucci has filed a Rule 12(b)(6) motions addressed to the First Amended Complaint, arguing (1) insufficiency of the facts under *Iqbal* and *Twombly*; and (2) that the two-year statute of limitations, 11 U.S.C. § 546(a)(1)(A), has expired and that the First Amended Complaint does not relate back because the complaint was devoid of facts sufficient to put him on notice.

LAW

Relation Back

As a rule, an amended complaint relates back in time to the date of the original complaint. Accordingly, an amended complaint will be deemed to "relate back" to the date of the original complaint and is not time barred, notwithstanding the intervening expiration of the statute of limitations. *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857-58 (9th Cir. 2011).

As to existing parties, the relate-back rules apply only if the claim in the amended complaint (1) arises out of the same "conduct, transaction or occurrence" as pled in the original complaint. *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325 (9th Cir. 1989) ("a common core of operative facts"); and (2) the original complaint puts the defendant on "notice" of the nature of the claim raised in the amended complaint. *ASARCP, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (2014); *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006); see also, Phillips & Stevenson, *Federal Civ. Proc. Before Trial, Calif. & 9th Cir. Editions*, Pleadings, Amended and Supplemental Pleadings § 8:1606 (The Rutter Group 2019).

Rule 12(b)(6)

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

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

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

DISCUSSION

Statute of Limitations

Absent extension, the statute of limitations for avoidance actions ran in this case on or about June 22, 2019. 11 U.S.C. § 546(a)(1)(A). The First Amended Complaint was filed August 14, 2019.

But the First Amended Complaint will be deemed timely if it "relates back" to the original complaint, which was filed June 10, 2019. Here, the First Amended Complaint satisfies both requirements to relate back. First, both pleadings allege rights arising out of the "conduct, transaction or occurrence." These rights arise, if at all, out of transfers described as "payroll," whether no-show or otherwise, aggregating $57,625.00 paid in 2016 and 2017. Second, the original complaint gave thin but sufficient notice of the "nature" of the claim, i.e., preferential and/or fraudulent transfers, S*antamarina*, 466 F.3d at 573, and the "facts" on which it was based, i.e. payments described as "payroll" in 2016 and 2017 aggregating $55,714. *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 962 (10th Cir. 2012). Accordingly, the First Amended Complaint is timely.

Sufficiency of the First Amended Complaint

Were the monies paid to Linda Castellucci for wages, were they commensurate with the services rendered, and were they paid in the ordinary course of business?

To prevail in this adversary proceeding Parker must plead and provide that those monies fall outside that framework. As to the pleading requirement, trustee Parker must show a plausible claim that the transfers to Castellucci were something beyond regular wages timely paid. Such a plausible claim requires well-pleaded facts, exclusive of conclusions, showing that the plaintiff is entitled to relief. *Twombly*, 550 U.S. at 556. Plausibility means showing that entitlement to relief is more than speculative. *Id.* But the showing need not rise to the level of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002); *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

Moreover, Ninth Circuit authority suggests that a plaintiff must plead facts supporting each element of the claim pled. *Johnson v. Riverside Healthcare System*, LP, 534 F3d 1116, 1122 (9th Cir. 2008),

(plaintiff must at least "allege sufficient facts to state the elements of … [his or her] claim").

Preference

An avoidable preference is one that improves a creditor's lot made on the eve of bankruptcy.

> Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--(1) to or for the benefit of a creditor; (2) for or on account of an **antecedent debt** owed by the debtor before such transfer was made; (3) made **while the debtor was insolvent**; (4) **made**--(A) on or within 90 days before the date of the filing of the petition; or (B) **between ninety days and one year before the date of the filing of the petition**, if such creditor at the time of such transfer was an insider; and (5) **that enables such creditor to receive more than such creditor would receive if--(A) the case were a case under chapter 7 of this title**; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (emphasis added).

Here, the facts and reasonable inferences therefrom do not support a finding of a plausible claim as to the following elements: (1) the existence of an antecedent debt, see First Amended Complaint ¶ 9 (describing a legal conclusion "The Transfers were on account of an antecedent debt owed by Debtor to Defendant before the transfer was made."); (2) insolvent, *compare* 11 U.S.C. § 101(32) *with* First Amended Complaint ¶ 10 (also describing a legal conclusion "At the time of the Transfers, Debtor was insolvent. Debtor's assets at all times during the period one year before the bankruptcy were worth less than the amount of its liabilities. . ."); (3) that the transfer occurred within one year of the petition, see First Amended Complaint Exh. A (indefinite in comparison to petition date of June 22, 2017, "2016 and 2017 Payroll"); and (4) the defendant received more than he would have received under Chapter 7, see First Amended Complaint ¶ 11 (also describing a legal conclusion, "The Transfers enable Defendant to receive more than he would have received under Chapter 7 of the Bankruptcy Code if the Transfers had not been made because if the Transfers had not been made, Defendant would have been an unsecured creditor and unsecured creditors will receive less than 100% of their claims in this Chapter 7 case.").

Fraudulent transfer

Constructively fraudulent transfers occur when the debtor is insolvent, insufficiently capitalized or experiencing cash flow problems.

> (a)(1) The trustee may avoid any transfer . . or any obligation (including any obligation to or for the

> benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . .
>
> (B)(i) **received less than a reasonably equivalent value in exchange** for such transfer or obligation; and
>
> > (ii)(I) was **insolvent** on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> >
> > > II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which **any property remaining with the debtor was an unreasonably small capital**;
> > >
> > > (III) intended to incur, or believed that the debtor would incur, **debts that would be beyond the debtor's ability to pay as such debts matured**; or
> > >
> > > (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 USC § 548 (emphasis added).

This case is remarkably similar to a recent decision by the Ninth Circuit Bankruptcy Appellate Panel, *Sharp v. Intracoastal Capital, LLC*, 2019 WL 4929933 (9th Cir. October 2, 2019). There the panel considered the *Iqbal* and *Twombly* plausibility pleading requirements in the context of constructively fraudulent transfers and upheld the trial court's decision granting a Rule 12(b)(6) motion. The panel described the pleading requirements for the "balance sheet test," "inadequate capital test," and "cash flow test" and found far more detailed pleadings than those in trustee Parker's First Amended Complaint lacking. For example, there the trustee attempted to allege balance sheet insolvency:

> ¶ 43. Apart from being cash-flow insolvent, BEI was also balance sheet insolvent at the time of the Transfers or became insolvent as a result thereof. Despite the company's disclosures during the relevant timeframe, its financial statements contained various accounting errors that resulted in a grossly overstated value of the company's assets. For example, BEI accounted for non-binding letters of intent on unfunded renewable energy projects as assets worth millions of dollars;
>
> ¶ 53. As noted above, BEI was insolvent at the time of the Transfers or became insolvent as a result thereof. It no longer had the ability to pay debts as they came due and the value of its liabilities exceeded its actual assets;

Id. at * 3.

Finding this to be insufficient fact pleading under *Iqbal* and *Twombly*, the court stated:

> We see no error here. The [First Amended Complaint] failed to articulate any amounts for BEI's assets and liabilities or allege that the overstated assets caused BEI's liabilities to exceed its assets. See *Harlan Cty. Mining, LLC v. Wrigley's 7–711, Inc. (In re Licking River Mining, LLC)*, 572 B.R. 830, 844 (Bankr. E.D. Ky. 2017) (while complaint alleged financial difficulties and identified prepetition debts, it failed to "comparably allege the value of Debtors' assets to demonstrate Debtors' insolvency.").

Id. at * 6.

Here, the pleadings are conclusions, not facts. The trustee has pled:

> The Debtor was insolvent on the date[s] the payment[s] constituting the Transfers were made.
>
> The Debtor was engaged in business for which any of the remaining property was unreasonably small capital.
>
> The Debtor intended to incur, or believed it would incur, debts beyond its ability to pay as such debts became due.

First Amended Complaint ¶¶ 15-17, August 14, 2019, ECF # 16.

These are legal conclusion, not facts. *Sharp v. Intracoastal Capital, LLC*, 2019 WL at * 6-9. The motion will be granted.[2]

LEAVE TO AMEND

As *Intracoastal Capital, LLC* reminds us, leave to amend should be freely granted.

> Civil Rule 15(a), applicable here by Rule 7015, provides that leave to amend should be "freely" granted "when justice so requires." We consider five factors to assess whether the trial court properly granted or denied leave to amend pleadings: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended the complaint. The Ninth Circuit has consistently held that a trial court abuses its discretion in denying leave to amend unless the court "'determines that the pleading could not possibly be cured by the allegation of other facts,'" or "if the plaintiff had several

[2] The Third Cause of Action, 11 U.S.C. § 544(b), incorporating Cal. Civ. Code § 3439.04(a)(2) suffers similar maladies.

> opportunities to amend its complaint and repeatedly failed to cure deficiencies." An amendment is futile when it is clear that amendment would not have remedied the complaint's factual deficiencies.

Id. at 10 (internal citations omitted).

Mindful of these factors, the court will allow the trustee one last opportunity to plead his case. Here, the first three elements described by *Intracoastal Capital, LLC* are not present. As to the fourth element, the court doubts that the trustee can remedy the shortcomings but cannot yet say an attempt would be futile. Finally, though the plaintiff has twice unsuccessfully attempted to plead preference and fraud, *Intracoastal Capital, LLC* reminds us of the need to give the plaintiff a full opportunity to plead its case. For these reasons, the court will grant trustee Parker one final opportunity to plead an avoidance action.

CONSENT/NON-CONSENT TO FINAL ORDERS AND JUDGMENTS

Effective December 1, 2016, Rule 7008 requires the plaintiff to plead affirmatively consent, or non-consent to the entry of final orders and judgments by this court.

> Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. **In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.**

Fed. R. Bankr. P. 7008 (emphasis added).

Post *Stern v. Marshall*, 564 US 462 (2011), Rule 7008 was amended to delete references to pleading whether a matter is core and add the consent/non-consent requirement.

Neither the complaint, nor the First Amended Complaint, appears to comply with Rule 7008. Each pleads that this is a core proceeding. While formerly the rule, this requirement is no longer applicable and complaints must plead that the plaintiff consents or does not consent to final orders and judgments by this court.

CIVIL MINUTE ORDER

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

Defendant Linda Castellucci's motion has been presented to the court. Having considered the motion to dismiss, opposition, and reply thereto, if any,

IT IS ORDERED that the motion is granted with leave to amend.

IT IS FURTHER ORDERED that plaintiff Randell Parker may file and serve his Second Amended Complaint no later than November 6, 2019. Any amended complaint shall address the issues raised by the court in this ruling that are applicable to the claims in the Second Amended Complaint and be accompanied by a redline copy showing all amendments, modifications and/or deletions.

IT IS FURTHER ORDERED that defendant Linda Castellucci may file an answer or other appropriate response to the amended complaint no later than December 4, 2019.

IT IS FURTHER ORDERED that if defendant Linda Castellucci files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on January 8, 2019 at 10:00 a.m.

IT IS FURTHER ORDERED that the parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence. In the event that defendant Linda Castellucci fails to file an answer or motion within the time specified in this order, plaintiff Randell Parker shall forthwith and without delay seek the entry of the defendant's default.

IT IS FURTHER ORDERED that plaintiff Randell Parker shall comply with Federal Rule of Bankruptcy Procedure 7008.

12. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
19-1069

STATUS CONFERENCE RE: COMPLAINT
6-10-2019 [1]

PARKER V. MOORE
DANIEL EGAN/ATTY. FOR PL.
CONTINUED TO 10/23/19 PER ECF ORDER #11

Final Ruling

The Status Conference is continued to October 23, 2019, at 10:00 a.m.