**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

**Honorable Ronald H. Sargis**
**Chief Bankruptcy Judge**
**Sacramento, California**

**November 12, 2020 at 11:00 a.m.**

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| **1.** | **19-26979-E-13**<br>**DPC-2** | **DOROTHY MIKO**<br>**David Foyil** | **CONTINUED MOTION TO DISMISS CASE**<br>**6-1-20 [31]** |

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.

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Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on June 1, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Dismiss is xxxxx.**

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that the debtor, Dorothy Norma Miko ("Debtor"), failed to file an amended plan after Trustee's Objection to Confirmation was sustained and Debtor's Plan was denied on January 28, 2020.

**DEBTOR'S OPPOSITION**

Trustee filed on June 18, 2020. a note received by Debtor (apparently prepared without the assistance of Debtor's counsel) which Trustee deemed an Opposition. Dckt. 37. Debtor describes having difficulty in pursuing a loan modification with Debtor's mortgage lender, and explains health issues and unexpected increases to income and decreases to income.

**DISCUSSION**

Since the case was filed in November 2019, Debtor has filed one plan. The Trustee filed an Objection To Confirmation (Dckt. 19), which was sustained January 28, 2020. Dckt. 26.

Since then, nothing has really been done to prosecute the case.

At the July 1, 2020 hearing, Debtor's counsel reported the status of the case and lack of effective communication with his client.

The court continued the hearing, requiring the appearance of both the Debtor and Debtor's counsel, to address these issues, if possible, and allow the Debtor the opportunity to explain how this Chapter 13 case will be prosecuted.

**TRUSTEE'S STATUS REPORT**

Trustee filed a Status Report on September 8, 2020 pointing to the court that Debtor continues to fail to file and set for hearing a new plan since the instant Motion was continued from July 1, 2020. Dckt. 43. Moreover, Debtor is $6,500 delinquent in plan payments. Thus, Trustee requests the court dismiss the case.

**DEBTOR'S OPPOSITION**

Debtor's Counsel filed an Opposition and a Declaration meant to expand Debtor's *pro se* Opposition in order to inform the court of specific events affecting the current case. Dckt. 46. Debtor's Counsel testifies that Debtor is 93 years old and has recently been diagnosed with a terminal medical condition and has been told that she has six months to two years to live.

Counsel advised Debtor to convert the case to a Chapter 7 after the mortgage pre-petition arrearage came much higher than expected ($78,723.89). Under this approach, Debtor would have to pursue a short sale in the hopes that the lender will allow her to remain in the residence until the property sells. However, Debtor has refused this approach as she does not want to lose her home and wishes to stay at the property.

Debtor has disposable income of two thousand five hundred forty-two and 94/100 dollars ($2,542.94), however, sometimes the debtor does not receive her rental income in the amount of one thousand two hundred fifty dollars ($1,250). Counsel believes the amount for monthly plan payments needed for Debtor to become current is not feasible. Absent a loan modification, there is no additional evidence to support a feasible plan.

Finally, Counsel has also discussed conversion to a Chapter 11 but Debtor does not have sufficient income to sustain a mortgage payment after taking the costs of medical care into account.

**DEBTOR'S IN *PRO SE* MOTION NOT TO CLOSE**

Debtor filed a handwritten note to the court on September 18, 2020 that the court has taken to be an Opposition to Trustee's Motion to Dismiss. Dckt. 50. Through this one page note, Debtor states the following:

> I Dorothy Miko am asking you to not close the Chapter 13. I need more time to get the Tenants, David Beerschinger and Teresa Fisher out of 6173 Dark Canyon Rd. Kelsey, Ca. 95667. The Courts here are still closed and I (Dorothy Miko) can not surve[sic] the tenants with court papers to move[.]
>
> They have been given (2) 3 day notices to pay rent or Quit and a 60 Day Notice to Move. They are still here and not paying total amount of rent. I am sending you a copy of the papers.
>
> [signature] Dorothy Miko

Dckt. 50. Attached to this note are:

> - 60 Day Notice to Vacate for tenants David Boerschinger and Teresa Fisher dated September 14, 2020
>
> - 3-Day Notice to Pay Rent or Quit for tenants David Boerschinger and Teresa Fisher dated September 14, 2020
>
> - 3-Day Notice to Pay Rent or Quit for tenants David Boerschinger and Teresa Fisher [undated]
>
> - 3-Day Notice to Pay Rent or Quit for tenants David Boerschinger and Teresa Fisher dated May 1, 2020
>
> - 60 Day Notice to Vacate for tenants David Boerschinger and Teresa Fisher dated May 1, 2020

Debtor's handwritten opposition (Dckt. 50) discusses the need to evict tenants. What it does not address is what Debtor's Chapter 13 plan can and will be. In effect, Debtor has "parked" in Chapter 13, protected but not prosecuting a plan. While such may appear to a lay person to be a reasonable device in the 2020 COVID-19 pandemic world, for a Chapter 13 case Debtor needs to be prosecuting a plan. That may include seeking a loan modification. That may be selling property. But it must be part of a properly confirmed Chapter 13 plan.

At the hearing, Debtor's counsel appeared, but not the Debtor or her Daughter (who is identified as also interacting with Debtor's counsel).

The court continues the hearing, ordering both Debtor and Debtor's Daughter to appear.

**November 12, 2020 Hearing**

As of the court's November 10, 2020 review of the docket in preparation for this pre-hearing disposition, no other pleadings have been filed.

At the hearing, xxxxxxxxxxxxxx

**2.** **20-21481-E-7** **CAROL PAYNE** **CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT**
**20-2119** **RLC-2 Gary Fraley** **8-21-20 [11]**

**CHERI ROBINSON AS TRUSTEE FOR ARTHUR AND AMRITA RO V. PAYNE**

**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.

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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 Defendant-Debtor, Defendant-Debtor's Attorney and Office of the United States Trustee on August 24, 2020. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment 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). 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.

**The Motion for Entry of Default Judgment is granted.**

Cheri Robinson, as Trustee for the Arthur and Amrita Robinson Family Trust (collectively "Plaintiff" or when referencing the Trust, "Robinson Family Trust") filed the instant Motion for Default Judgment on August 21, 2020. Dckt. 11. Plaintiff seeks a default judgment against Carol Lydia Payne ("Defendant-Debtor") in the instant Adversary Proceeding No. 20-02119.

The instant Adversary Proceeding was commenced on June 17, 2020. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on June 18, 2020. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on July 21, 2020. Dckt. 8.

**SUMMARY OF COMPLAINT**

Plaintiff filed a complaint to determine dischargeability of debt under 11 U.S.C.§ 523(a)(4). The Complaint contains the following general allegations as summarized by the court:

A. Defendant-Debtor filed a Chapter 7 bankruptcy case on March 12, 2020.

B. Defendant-Debtor failed to list Plaintiff as a creditor and failed to disclose the litigation pending in the Superior Court for the County of Contra Costa, Case No. P19-01625 ("State Court Action").

C. On November 19, 2019, the State Court Judge entered an Order a) removing Defendant-Debtor as Trustee of the Robinson Family Trust ; b) appointing Cheri Robinson as Trustee of the Robinson Family Trust; and c) requiring Defendant-Debtor to file a report and account for her acts during her tenure as trustee within 30 days of November 1, 2019 and ordering her not to use Trust funds for her defense.

D. State Court Judge entered Order in favor of Plaintiffs on January 21, 2020, and amended on January 30, 2020,

a) removing Defendant-Debtor as Trustee of the Robinson Family Trust;

b) appointing Cheri Robinson as Trustee of the Robinson Family Trust; and

c) ordering Defendant-Debtor turn over all trust assets to successor trustee including real property known as 4405 Feather River Blvd., Olivehurst, California within five days of January 21, 2020. Defendant-Debtor has failed to comply with the court's order.

E. Additionally, the January 21, 2020 Amended Order required Defendant-Debtor to pay double damages for the value misappropriated; not use Trust funds for her defense and to be surcharged to the extent that she used trust funds for her defense, and awarded Plaintiff attorney fees and costs.

F. Arthur and Amrita Robinson ("Settlors") established the Robinson Family Trust on June 26, 1994.

G. The Robinson Family Trust was revised and entirely replaced on August 5, 2005. The Trust was created for Settlors' benefit and for the benefit of their son, Steven Robinson and his children. At that time, the Robinson Trust named Mechanics Bank Trust Department as successor trustee following the death of surviving settlor.

H. The Robinson Family Trust was amended and restated on August 4, 2014 naming Lenora Robertson, Settlors' friend, as successor Trustee

and Carol Payne, Settlors' friend, as alternative successor Trustee.

I. Settlor Arthur Robinson passed away on February 10, 2015 and Settlor Amrita Robinson passed away on March 1, 2016. Settlor Amrita Robinson's cash assets of approximately $80,000 have disappeared. Plaintiff does not know the exact amount of the cash received by Defendant-Debtor.

J. On March 31, 2016, Trustee Lenora Robertson resigned, and Defendant-Debtor became the trustee.

K Defendant-Debtor sold real property of the Robinson Family Trust on June 2016 without giving Notice of the Proposed Action to the Plaintiff and other beneficiaries and while they were on vacation abroad. Defendant-Debtor obtained at least $279,101.72 from this sale.

L. Defendant-Debtor also obtained at least $203,075.77 in life insurance proceeds from a Jackson National Life Insurance policy on January 13, 2017. Defendant-Debtor also obtained at least $27,871.66 in life insurance proceeds from a Midland National Life Insurance on May 31, 2017.

M. After reviewing the Robinson Family Trust's Bank of America account, Plaintiff believes that Defendant's Debtor spent $635,99.82 between March 2, 2018 and August 5, 2019: $234,288.01 spent on trust purposes and $401,702.81 spent by Defendant-Debtor in non-trust purposes. No inventory of trust assets has been provided by Defendant-Debtor.

N. To date, Defendant-Debtor has failed to provide a proper accounting to Plaintiff and the beneficiaries. Defendant-Debtor provided an "accounting" on June 4, 2020, attached as Exhibit A of the Complaint. (The court notes that Exhibit A is a series of handwritten notes with amounts and one to three word descriptions, some of them upside-down, a two-page dental surgery itemization and payment plan form, and two void checks, #2088 and #2085.)

O. Defendant-Debtor has failed to perform her duties in a reasonable and prudent manner, breached her fiduciary duties and breached the trust. Defendant has engaged in self-dealing. Defendant violated her duty of loyalty and used Robinson Family Trust assets for her benefit and to the detriment of the beneficiaries. Moreover, Defendant-Debtor commingled Robinson Family Trust assets with her personal assets.

**Prayer**

Plaintiff requests the following relief in the Complaint's prayer:

A. A determination of the amount of damages owed by Defendant-Debtor to Plaintiff as the result of her fraud/defalcation/embezzlement; and

B. A determination that the damages suffered by the Robinson Family Trust are nondischargeable.

**RELIEF SOUGHT IN MOTION FOR DEFAULT JUDGMENT**

Plaintiffs filed the Motion for Default Judgment, accompanied by, the Declaration of Cheri Robinson, Dckt. 13.

In the Motion, Plaintiff requests the following relief:

1. A determination that the amount owed by Defendant-Debtor to Plaintiffs is $902,000.

2. That the amount owing is not discharged in Defendant-Debtor's bankruptcy case.

**REVIEW OF THE MOTION FOR ENTRY OF DEFAULT JUDGMENT**

On August 21, 2020, Plaintiffs filed the instant Motion for Entry of Default Judgment pursuant to Fed. R. Bankr. P. 7055. Dckt. 11. Plaintiff asserts that the evidence offered in support of this Motion supports the well-pleaded factual allegations in the Complaint.

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

1. On June 17, 2020 Plaintiff filed the instant adversary proceeding alleging that Defendant breached her duties to the Robinson Family Trust and that discharge should be denied pursuant to 11 U.S.C. § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

2. Defendant-Debtor failed to list Plaintiff as a creditor and failed to disclose the litigation pending in the Superior Court for the County of Contra Costa.

3. State Court Judge entered Amended Order in favor of Plaintiff on January 30, 2020 removing Defendant-Debtor as Trustee of the Robinson Family Trust and ordering Defendant-Debtor turn over all trust assets including real property. Defendant-Debtor has failed to comply with the court's order.

4. The Amended Order required Defendant-Debtor to pay double damages for the value misappropriated; not use Trust funds for her defense and awarded Plaintiff attorney fees and costs.

5. Plaintiff filed Proof of Claim 2 on July 3, 2020 in the amount of $902,000, an estimate of the amount embezzled by Defendant-Debtor

plus attorney fees.

6. Arthur and Amrita Robinson ("Settlors") established the Robinson Family Trust on June 26, 1994.

7. The Robinson Family Trust was revised and entirely replaced on August 5, 2005. At that time, the Robinson Family Trust named Mechanics Bank Trust Department as successor trustee following the death of surviving settlor.

8. The Robinson Family Trust agreement was amended and restated on August 4, 2014 naming Lenora Robertson, Settlors' friend, as successor Trustee and Carol Payne, Settlors' friend, as alternative successor Trustee.

9. Settlor Arthur Robinson passed away on February 10, 2015 and Settlor Amrita Robinson passed away on March 1, 2016. Settlor Amrita Robinson's cash assets of approximately $80,000 have disappeared. Plaintiff does not know the exact amount of the cash received by Defendant-Debtor.

Motion, Dckt. 11. The above is the entirety of what is stated in the Motion. No exhibits are provided in support of the Motion.

**ADDITIONAL DOCUMENTS FILED WITH THE MOTION**

Next, the Declaration of Cheri Robinson, one of the Plaintiffs in this adversary proceeding was filed. Dckt. 13. Plaintiff Cheri Robinson's Declaration seems to be a word for word copy/paste of the motion. The only statement added to this declaration not found in the motion is the following statement of funds spent by Defendant-Debtor as it pertained to the bank statement for the Trust:

> Between April 14, 2016 and August 5, 2019 $635,90.82 was expended from that account. Of those expenses I believe that $234,288.01 were likely expended on trust purposes. The leaves $401,702.81 spent by Defendant on a variety of purposes. There were frequent cash withdrawals and checks payable to cash, veterinary bills, house payments for Defendant's residence, car repairs, in all hundreds of payments that did not benefit the Trust or the beneficiary of the Trust. I also believe that attorney fees that the Trust has incurred now exceed $50,000. Judge Sugiyana's January 21, 2020 order awarded double damages to the Trust. The Proof of Claim that I filed in Defendant's bankruptcy case reflects the doubling required by Judge Sugiyana. I suspect that Defendant misappropriated more money from the Trust but without an accounting[.]

*Id*. at ¶ 7.

Moreover, Plaintiff Robinson states in her declaration that the January 21, 2020 Order as Amended is filed as an Exhibit in support of the present motion, yet no exhibits were filed in support.

Indeed the January 21, 2020 Order as Amended has not been filed as an exhibit in this adversary proceeding.

**Entry of Defendant-Debtor's Default and Order for Supplemental Pleadings**

At the October 15, 2020 hearing, the court entered the default of Defendant as to this Motion for Entry of Default. The court continued the hearing to allow Plaintiff to file supplemental declaration testimony and exhibits providing evidence of how the amount of damages is computed and the source of that information. Due to the stated small amounts of the individual transfers, Plaintiff may provide testimony of the information concerning the transfers, the source of the information, and the computation of the damages, without having to file the underlying source documents, which are years of bank account statements.

**November 4, 2020 Supplemental Declaration**

Plaintiff filed a Supplemental Declaration on November 4, 2020. Dckt. 19. Plaintiff testifies as to how the damages were computed and the sources of that information, namely that:

1. As Defendant has failed to produce an accounting for her time as Trustee, the damages caused by Defendant are estimated to be $902,000.00.

2. Plaintiff's estimate is based on a spreadsheet record she kept of every check from the Trust Bank of America bank account during the period in which Defendant controlled the account. The records categorized the expenses by those that benefitted her husband or children, the Alvarado house, the Francisco house, and her mother-in-law's expenses. A final category was created for expenses with an unclear purpose, named "Carol/No Idea," which includes cash withdrawals, various store purchases, and veterinary bills. Plaintiff believes numerous checks were written, which were placed under this category, that were given descriptions in the check memo section that were an attempt to disguise embezzlement. Plaintiff references a spreadsheet record that is not present, despite her stating that it is attached to the declaration.

3. Plaintiff states the total sum of expenses under the "Carol/No Idea" category is $401,702.81. This amount does not include attorneys fees which Plaintiff states she is entitled to. She estimates the current amount of attorney's fees owed exceeds $50,000.00.

**APPLICABLE LAW**

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

**Debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny pursuant to 11 U.S.C. § 523(a)(4)**

In section 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny." Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

"Defalcation" for purposes of this exception to discharge refers to a failure to produce funds entrusted to a fiduciary. On this point, the case law has always been uniform. However, prior to 2013, the courts were divided regarding the required scienter for application of the discharge exception. The Supreme Court settled the issue in 2013, in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 133 S. Ct. 1754 (2013), holding that defalcation under section 523(a)(4) requires "a culpable state of mind" with a "knowledge of, or gross recklessness in respect to the improper nature of the relevant fiduciary behavior." *Bullock*, 569 U.S. at 269. The Court emphasized that even if the debtor's conduct does not involve bad faith or immoral conduct, the conduct giving rise to the debt must be intentional conduct. For purposes of defalcation under section 523(a)(4), the Court included within the scope of intentional conduct "not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id.* at 273. That equivalency to actual knowledge exists

if the debtor-fiduciary "consciously disregards" or is willfully blind to "a substantial and unjustifiable risk" that his conduct will breach a fiduciary duty. *Id.* at 274 (quoting ALI, Model Penal Code § 2.02(2)(c) (1985)).

The required elements of embezzlement are: (1) appropriation of funds for the debtor's own benefit by fraudulent intent or deceit; (2) the deposit of the resulting funds in an account accessible only to the debtor; and (3) the disbursal or use of those funds without explanation of reason or purpose. *In re Bryant*, 28 C.B.C.2d 184, 147 B.R. 507 (Bankr. W.D. Mo. 1992). For purposes of section 523(a)(4) it is improper to automatically assume embezzlement has occurred merely because property is missing, since it could be missing simply because of noncompliance with contractual terms. *In re Hofmann*, 27 C.B.C.2d 1291, 144 B.R. 459 (Bankr. D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993); *see also In re Rose*, 934 F.2d 901 (7th Cir. 1991).

Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker's use without the consent of the owner. As distinguished from embezzlement, the original taking of the property must be unlawful. For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a "felonious taking of another's personal property with intent to convert it or deprive the owner of same." *In re Smith*, 253 F.3d 703 (5th Cir. 2001) (not for publication); *In re Rose*, 934 F.2d 901 (7th Cir. 1991).

In short, section 523(a)(4) excepts from discharge debts resulting from the fraudulent appropriation of another's property, whether the appropriation was unlawful at the outset, and therefore a larceny, or whether the appropriation took place unlawfully after the property was entrusted to the debtor's care, and therefore was an embezzlement. 4 Collier on Bankruptcy P 523.10 (16th 2019).

**DISCUSSION**

The default of Defendant-Debtor has been entered. Dckt. 18. In her Supplemental Declaration, Plaintiff Cheri Robinson as Trustee, has provided personal knowledge testimony of how she computes the asserted nondischargeable damages.

In the Complaint, there is stated to be $481,702.81 of the Robinson Family Trust monies spent by Defendant-Debtor for non-trust purposes or unaccounted for by Defendant-Debtor. Complaint, ¶¶ 5, 9; Dckt. 1. In her Declaration, Plaintiff has identified damages totaling $902,000. These are detailed in Paragraph 2 of the Supplemental Declaration, with explanations of how Plaintiff has constructed this from the records and information available. Though ordered by the State Court judge to do so, Defendant-Debtor has not provided an accounting of the monies she handled during her service as the trustee of the Trust.

The court determines the amount of damages caused by Defendant-Debtor to the Robinson Family Trust during her tenure as the Trustee is $902,000, of which $50,000 is for attorney's fees and costs for the successor Trustee in pursuing claims for the breach of Defendant-Debtor's duties and the misappropriation of Trust monies.

The conduct of Defendant-Debtor in causing the $902,000 in damages constitutes a defalcation by a fiduciary as provided in 11 U.S.C. § 523(a)(4). These acts are intentional and though ordered by the State Court, not explained by former Trustee Defendant-Debtor.

This court concludes that the defalcation occurred and was systematically conducted by Defendant-Debtor with the "a culpable state of mind" with a "knowledge of, or gross recklessness in respect to the improper nature of the relevant fiduciary behavior" as required under the Supreme Court's ruling in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269 (2013). For purposes of defalcation under section 523(a)(4), the Supreme Court included within the scope of intentional conduct "not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id.* at 273. That equivalency to actual knowledge exists if the debtor-fiduciary "consciously disregards" or is willfully blind to "a substantial and unjustifiable risk" that his conduct will breach a fiduciary duty. *Id.* at 274 (quoting ALI, Model Penal Code § 2.02(2)(c) (1985)).

As provided under California law, the trustee of a trust "has a duty to administer the trust solely in the interest of the beneficiaries." Cal. Prob. § 16002(a). As discussed in Witkin Summary of California Law:

> The trustee is a fiduciary, and as such must act in the highest good faith towards the beneficiary, must make full disclosure of material facts, must not acquire an adverse interest, and must not use the position to gain any advantage over the beneficiary or to make any special profit. *(See Estate of McLaughlin* (1954) 43 C.2d 462, 470, 274 P.2d 868; *Overell v. Overell* (1926) 78 C.A. 251, 256, 248 P. 310; *Kinert v. Wright* (1947) 81 C.A.2d 919, 925, 185 P.2d 364; *Estate of Vokal* (1953) 121 C.A.2d 252, 257, 263 P.2d 64; *Lix v. Edwards* (1978) 82 C.A.3d 573, 581, 147 C.R. 294, citing the text [nondisclosure of adverse consequences of transfer of assets]; . . . .

13 Witkin, Summary 11th Trusts § 75(2) (2020).

Here, the conduct occurred over an extended period of time and the Robinson Family Trust monies were diverted to the Defendant-Debtor's and family's personal use and benefit. No explanation or good faith reason for why Defendant-Debtor believed she could use the Robinson Family Trust assets for her personal benefit was offered.

This conduct of using the Robinson Family Trust assets for her personal and family benefit constitutes an embezzlement for purposes of 11 U.S.C. § 523(a)(4). As addressed above, the required elements of embezzlement are: (1) appropriation of funds for the debtor's own benefit by fraudulent intent or deceit; (2) the deposit of the resulting funds in an account accessible only to the debtor; and (3) the disbursal or use of those funds without explanation of reason or purpose. *In re Bryant*, 28 C.B.C.2d 184, 147 B.R. 507 (Bankr. W.D. Mo. 1992). For purposes of section 523(a)(4) it is improper to automatically assume embezzlement has occurred merely because property is missing, since it could be missing simply because of noncompliance with contractual terms. *In re Hofmann*, 27 C.B.C.2d 1291, 144 B.R. 459 (Bankr. D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993); *see also In re Rose*, 934 F.2d 901 (7th Cir. 1991).

Here, the evidence shows that the monies were transferred from the Robinson Family Trust to or for the benefit of the Defendant-Debtor or her family personally. These transfers are unexplained, the Defendant-Debtor choosing not to respond in this court and failing to provide an accounting as ordered by the State Court judge.

The Motion is granted and judgment shall be entered determining the amount of the damages arising from the defalcation while acting in a fiduciary capacity and embezzlement, as separate and independent grounds, to be $902,000, and that such judgment is nondischargeable as provided in 11 U.S.C. § 523(a)(4).

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 for Entry of Default Judgment filed by Cheri Robinson, as Trustee for the Arthur and Amrita Robinson Trust, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and judgment shall be entered for Plaintiff Cheri Robinson, as Trustee for the Arthur and Amrita Robinson Trust and against Defendant Carol Lydia Payne in the amount of $902,000, and that said judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).
>
> Costs and attorney's fees, if any, shall be requested as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, and any such amounts are nondischargeable as part of this judgment.

**3.** **20-20168-E-7** **SHAWN MYERS** **CONTINUED MOTION TO DISMISS**
**20-2023** **Len Reynoso** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

**ADRIAN, JR. V. MYERS** **8-14-20 [23]**
**3 thru 5**

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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Chapter 7 Trustee, and Office of the United States Trustee on August 14, 2020. By the court's calculation, 20 days' notice was provided. 28 days' notice is required.

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

**The Motion to Dismiss Adversary Proceeding is granted as to the claim for relief pursuant to 11 U.S.C. §523(a)(2)(B) and denied as to the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(A).**

Shawn A. Myers ("Defendant-Debtor") moves for the court to dismiss all claims against it in George Albert Adrian, Jr.'s ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

Plaintiff filed the instant adversary proceeding on March 5, 2020, against Defendant. Dckt. 1. On March 12, 2020, Plaintiff filed an Amended Complaint. Dckt. 7.

**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. Plaintiff fails to provide evidence of a writing to allege fraud under 11 U.S.C. § 523(a)(2)(B). Plaintiff refers to the original unsecured contract, the Deed and Deed of Trust but they are not provided with the complaint. Moreover, even if presented, the documents only show that Defendant was unable to refinance the property within the 90 days.

B. Plaintiff fails to allege fraud or deceit under 11 U.S.C. § 523(a)(2)(B) when referring to the State Court complaint because even if the State Court complaint was taken as true, it fails to state facts that show fraud or deceit.

C. Plaintiff further fails to provide concrete evidence of fraud and/or deceit

and has only provided labels, conclusions, and speculations.

D. While Plaintiff claims $65,000 in damages, $50,000 are based on future events that are speculative.

E. Additionally, Plaintiff makes conclusions as to Defendant's state of mind and not facts to support the allegation of fraud.

F. Plaintiff was aware of Defendant's potential financial issues on the basis that Defendant is the current boyfriend to Plaintiff's ex-wife, and was asking him to co-sign a loan and co-own property with, while also agreeing to pay him $15,000 for the co-signature.

**Plaintiff-Debtor's Opposition**

Plaintiff-Debtor filed an Opposition on September 10, 2020. Dckt. 33. Plaintiff-Debtor argues that Plaintiff and Defendant entered into an agreement where Plaintiff was to receive $15,000 for co-signing on a house with Defendant. *Id.,* at ¶ 1. Defendant failed to inform Plaintiff that due to Defendant's poor credit Defendant would be unable to refinance the property within the 90 days. *Id.,* at ¶ 2.

Due to Defendant's financial disrepair, the home was foreclosed on a year later. *Id.,* at ¶ 3. Plaintiff argues that it was obvious that Defendant intentionally withheld financial information from Plaintiff and because of this fraud, deceit and misrepresentation, Plaintiff's has suffered severe financial complications. *Id.,* at ¶¶ 4-5.

**DISCUSSION**

**Review of the Amended Complaint**

Plaintiff's Amended Complaint seeks a determination that Plaintiff's claims are nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (B) as the claims arise from Defendant's misrepresentations regarding the co-signing of a loan for a house. The grounds upon which these claims are based are as follows:

A. Defendant has willfully caused injury by fraud and deceit.

B. A civil complaint was filed in Sacramento County Superior Court on October 22, 2019 alleging breach of contract, misrepresentation (fraud), Deceit with Exemplary Damages, and a Court Order to Sell Real Property. (Copy of the State Court Complaint attached as Exhibit 1.)

C. The case is pending and set for management conference on April 23, 2020.

D. Plaintiff requests $65,000 in damages in the Sacramento Superior Court case.

E. The debt owed from Defendant to Plaintiff is nondischargeable under section 523(a)(2)(A) and (B) of the Bankruptcy Code and therefore, the automatic stay under Section 4001 of the Bankruptcy Code would not apply to Plaintiff's case described above.

Those "grounds" are merely conclusions of law by Plaintiff. However, attached to the Amended Complaint is the State Court Complaint. As directed by the Ninth Circuit in *Swartz*, this court also considers the allegations therein. The State Court Complaint, Exhibit 1 (Dckt. 6), includes the following (identified by paragraph number in the State Court Complaint):

General Allegations

1. In May and June of 2018, Defendant approached Plaintiff and asked Plaintiff to help him buy a house at 753 Corvey Circle, Galt, California, 95632 by Co-signing the loan and being on title, and a brief agreement was signed by both parties on June 5, 2018 . . .
. . .

b. In return for helping to purchase the above described real property, Defendant promised Plaintiff that he would refinance the home within 90 days (from purchase) and pay Plaintiff $15,000.00. It was understood that at the refinance Plaintiff's name would be removed from the Title to the property.

2. What Defendant did not tell Plaintiff is that there was no way he could refinance the subject real property because of his bad credit and prior Foreclosures on property Defendant had purchased.

3. On June 7, 2018 at Page 0861, the Deed to the subject real property was recorded granting title to the property to Shawn Myers and George Adrian Jr. and a Deed of Trust for the benefit of Caliber Home Loans, Inc was recorded thereafter with Shawn Myers and George Adrian Jr. as the Borrowers. . . .

4. 90 days from the close of escrow and recordation of the Deed and Deed of Trust, and Defendant had not refinanced the property nor been able to remove Plaintiff's name from the loan or from title. He kept saying he was going to do this.

6. Defendant then stated he had other property in Valley Springs he could sell so that he could pay off the property which is the subject of this action. When checked on line, the Valley Springs property was not listed for sale and there was no proof it belonged to Defendant.

8. Defendant would not contact Plaintiff or return messages in regard to a possible sale of the property [the Notice of Default having been filed by the secured lender] before the foreclosure process is completed and Plaintiff's name would be required for any listing and sale. Selling the property would help to mitigate damages to Plaintiff and Defendant.

9. With the late payments on the property, which is the subject of this action, and then the beginning of a foreclosure procedure by the lender, Plaintiff's credit is suffering badly and he cannot buy a home of his own. Plaintiff estimates that his damages for this are in excess of $50,000.00 due to greater interest rates he would have to pay if he even can qualify now to purchase a home. And there are many other ramifications of the bad credit reports. Before this agreement and the deal with Defendant, Plaintiff had excellent credit.

Second Cause of Action - Fraud
[numbering restarted at 1 for each Cause of Action]

2. Defendant represented to Plaintiff that he would refinance the subject property, pay Plaintiff $15,000.00 for co-signing on the property and that he would have Plaintiffs name removed from title and any loan on the property.

3. At the time Defendant made the above representations, he knew that he would not qualify for any refinancing based on the foreclosure proceedings he had on his record.

4. Plaintiff relied upon Defendant's misrepresentation and has been damaged in excess of $50,000.00 by loss of his credit which has adversely affected his ability to purchase his own house among other things and including higher interest rates on everything purchased on credit. . . .

Third Cause of Action - Statutory Deceit
Cal. Civ. §§ 1709, 1710

2. The facts stated by Defendant that he would refinance the subject real property to pay Plaintiff the sum of $15,000.00 and have his name removed from the title to the property and any loan on the property were not true and he did not believe them to be true having access to knowledge that he would not qualify for the refinancing that he needed to keep his promises to Plaintiff.

3. Defendant also did not have any reasonable ground for believing his statements to Plaintiff were true knowing about his prior foreclosures on real property he had purchased.

4. Defendant was bound to disclose the facts about his bad credit and prior foreclosure actions against him to Plaintiff before Plaintiff agreed to co-sign the loan on the property which is the subject of this action and Defendant did not disclose these facts.

5. Therefore, it appears that Defendant made the promises listed above to Plaintiff without any intention of performing them to the damage of Plaintiff. . . .

6. California Civil Code Section 3294 provides for exemplary (Punitive) damages for fraud by way of example and for punishment when there is clear and

convincing evidence of that fraud and Plaintiff will ask the court for such damages.

**Settlement Discussions**

On September 24, 2020, the court continued this motion to afford the parties additional time with their ongoing settlement negotiations after the court was informed that the parties had engaged in settlement discussions. Civil Minutes, Dckt. 39. On November 10, 2020, the court was notified that the settlement discussions may have broken down and the parties may no longer be in agreement as to the stipulation that was circulating.

**Claim for Relief Pursuant to 11 U.S.C. § 523(a)(2)(B)**

The Amended Complaint seeks relief pursuant to 11 U.S.C. § 523(a)(2)(B) to have the asserted damages be nondischargeable. Congress provides in 11 U.S.C. § 523(a)(2)(B) for the nondischargeability of a debt as follows:

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> . . .
> (B) 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; and
>
> (iv) that the debtor caused to be made or published with intent to deceive; . . .

For a debt to be nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B), there must be a statement in writing respecting the debtor's financial condition. 11 U.S.C. § 523(a)(2)(B)(ii). As stated in Collier on Bankruptcy:

> [a] Element No. 1 under Section 523(a)(2)(B): Statement in Writing
>
> To come within the exception of section 523(a)(2)(B), the statement, to be "in writing," must have been either written by the debtor, signed by the debtor, or written by someone else but adopted and used by the debtor.[32] The requirement of a writing is a basic precondition to nondischargeability under section 523(a)(2)(B).[33]

32. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85 (6th Cir. 1993); *Engler v. Van Steinburg*, 744 F.2d 1060, 11 C.B.C.2d 1190 (4th Cir. 1984); *Lowell Holding Corp. v. Granovetter*, 29 B.R. 631 (Bankr. E.D.N.Y. 1983); *In re Gonzalez*, 287 F. Supp. 281 (S.D.N.Y. 1968).

33. *In re Kerbaugh*, 29 C.B.C.2d 1558, 159 B.R. 862 (Bankr. D.N.D. 1993); *In re Oliver*, 145 B.R. 303 (Bankr. E.D. Mo. 1992). *Blackwell v. Dabney*, 702 F.2d 490 (4th Cir. 1983); *In re De Glopper*, 138 F. Supp. 928 (W.D. Mich. 1956); *Little v. Commercial Bill Corp. (In re Little)*, 65 F.2d 777 (2d Cir. 1933).

4 Collier on Bankruptcy P 523.08 (16th 2020)

Here, cobbling together the allegations in the Amended Complaint and State Court Complaint filed as Exhibit 1 to the Amended Complaint, there are no allegations of there being a written statement respecting the Defendant-Debtor's financial condition given to Plaintiff.

Plaintiff's Opposition does not assert that there was any such written statement. Dckt. 33. Rather, it is argued that "What Defendant did not tell Plaintiff . . ." (Opposition, ¶ 2; Dckt. 33); and "It is obvious that Defendant intentionally withheld his financial situation from the Plaintiff" (*Id.*, ¶ 4).

There being no allegation of this fundamental requirement for relief pursuant to 11 U.S.C. § 523(a)(2)(B), the Motion is granted and the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(B) is dismissed.

**Claim for Relief Pursuant to 11 U.S.C. § 523(a)(2)(A)**

Plaintiff also seeks relief pursuant to 11 U.S.C. § 523(a)(2)(A), fraud other than a written statement of financial condition.

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; . . .

For the actual fraud required for relief pursuant to 11 U.S.C. § 523(a)(2)(A), the creditor is required to establish the following five elements:

> (1) the debtor made . . . representations;
>
> (2) that at the time he knew they were false;
>
> (3) that he made them with the intention and purpose of deceiving the creditor;
>
> (4) that the creditor relied on such representations; [and]

(5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

*In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010). A creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz*, 523 U.S. 213, 215, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998).

In *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 194 L. Ed. 2d 655 (2016), the Supreme Court held that the term "actual fraud," as used in 11 U.S.C. § 523(a)(2), includes fraudulent conveyance schemes that would not include a "representation," but are fraudulent under applicable non-bankruptcy law.

Defendant-Debtor argues in his Motion to Dismiss and Points and Authorities first makes the legally unsupported argument that Plaintiff is "not an actual creditor since the debt has not been perfected." Points and Authorities, 3:11-12; Dckt. 25. The court is unsure as to how a debt is "perfected." While perfection of a lien is common legal terminology, perfecting a debt is not. It appears that this reference is merely that the State Court action has not been reduced to judgment. There is no requirement that a pre-petition obligation be reduced to a judgment to be a claim in the bankruptcy case or for a creditor to seek a judgment on that claim from the bankruptcy court and that such judgment is nondischargeable. [Fn.1.]

---

FN. 1. The term "Creditor" is defined in 11 U.S.C. § 101(10) as being an entity that has a "claim" against the debtor that arose prior to the commencement of the bankruptcy case.

The term "Claim" is further defined in 11 U.S.C. § 101(5) [emphasis added], the word of which as written by Congress state:

> (5) The term "claim" means—
> (A) right to payment, **whether or not such right is reduced to judgment**, liquidated, unliquidated, fixed, contingent, matured, **unmatured**, **disputed,** undisputed, **legal, equitable**, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

There is nothing in this federal definition of the word "Claim" which requires that there be a "perfection" of the obligation.

---

Boiling down the allegations in the First Amended Complaint and Exhibit 1, the State Court Complaint, that is part of the Amended Complaint, Plaintiff alleges (identified by paragraph number in the State Court Complaint, Exhibit 1):

> 1. In May and June of 2018, Defendant approached Plaintiff and asked Plaintiff to

help him buy a house at 753 Corvey Circle, Galt, California, 95632 by Co-signing the loan and being on title.

A brief agreement was signed by both parties on June 5, 2018 . . .

> b. In return for helping to purchase the above described real property, Defendant promised Plaintiff that he would refinance the home within 90 days (from purchase) and pay Plaintiff $15,000.00. It was understood that at the refinance Plaintiff's name would be removed from the Title to the property.

Second Cause of Action - Fraud

2. Defendant represented to Plaintiff that he would refinance the subject property, pay Plaintiff $15,000.00 for co-signing on the property and that he would have Plaintiffs name removed from title and any loan on the property.

The representation by the Defendant-Debtor was that in 90 days Defendant-Debtor would refinance the property, pay Plaintiff $15,000 for his assistance, and get Plaintiff off the title to the property (and necessarily the loan through the refinance).

2. What Defendant did not tell Plaintiff is that there was no way he could refinance the subject real property because of his bad credit and prior Foreclosures on property Defendant had purchased.

Second Cause of Action - Fraud

3. At the time Defendant made the above representations , he knew that he would not qualify for any refinancing based on the foreclosure proceedings he had on his record.

Third Cause of Action - Statutory Deceit

2 . The facts stated by Defendant that he would refinance the subject real property to pay Plaintiff the sum of $15,000.00 and have his name removed from the title to the property and any loan on the property were not true and he did not believe them to be true having access to knowledge that he would not qualify for the refinancing that he needed to keep his promises to Plaintiff.

Third Cause of Action - Statutory Deceit

3. Defendant also did not have any reasonable ground for believing his statements to Plaintiff were true knowing about his prior foreclosures on real property he had purchased.

It is asserted that this representation was false and Defendant-Debtor knew it was false because Defendant-Debtor knew that he had bad credit, including prior foreclosures, and that he could not obtain the refinance he represented to Plaintiff.

> 3. On June 7, 2018 at Page 0861, the Deed to the subject real property was recorded granting title to the property to Shawn Myers and George Adrian Jr. and a Deed of Trust for the benefit of Caliber Home Loans, Inc was recorded thereafter with Shawn Myers and George Adrian Jr. as the Borrowers. . . .

The representations were made to Plaintiff to get him to co-sign the loan, relying on the alleged false representation. Plaintiff did rely and the credit, with the assistance of Plaintiff as a co-signor, was obtained by Defendant-Debtor and the property purchased.

> 4. 90 days from the close of escrow and recordation of the Deed and Deed of Trust, and Defendant had not refinanced the property nor been able to remove Plaintiff's name from the loan or from title. He kept saying he was going to do this.
>
> 6. Defendant then stated he had other property in Valley Springs he could sell so that he could pay off the property which is the subject of this action. When checked on line, the Valley Springs property was not listed for sale and there was no proof it belonged to Defendant.
>
> 8. Defendant would not contact Plaintiff or return messages in regard to a possible sale of the property [the Notice of Default having been filed by the secured lender] before the foreclosure process is completed and Plaintiff's name would be required for any listing and sale. Selling the property would help to mitigate damages to Plaintiff and Defendant.
>
> Second Cause of Action - Fraud
>
> 4. Plaintiff relied upon Defendant's misrepresentation and has been damaged in excess of $50,000.00 by loss of his credit which has adversely affected his ability to purchase his own house among other things and including higher interest rates on everything purchased on credit. . . .
>
> 9. With the late payments on the property, which is the subject of this action, and then the beginning of a foreclosure procedure by the lender, Plaintiff's credit is suffering badly and he cannot buy a home of his own. Plaintiff estimates that his damages for this are in excess of $50,000.00 due to greater interest rates he would have to pay if he even can qualify now to purchase a home. And there are many other ramifications of the bad credit reports. Before this agreement and the deal with Defendant, Plaintiff had excellent credit.
>
> Second Cause of Action - Fraud
>
> 4. Plaintiff relied upon Defendant's misrepresentation and has been damaged in excess of $50,000.00 by loss of his credit which has adversely affected his ability to purchase his own house among other things and including higher interest rates on everything purchased on credit. . . .

Plaintiff allegations are based on his reliance on the representation that the loan for the property would

be refinanced within 90 days, and thus he has suffered damages - past, current, and future.

Without making any factual determinations as to what the court finds credible or whether reliance is justified, the First Amended Complaint does sufficient state a claim for the court to deny the Motion as to the 11 U.S.C. § 523(a)(2)(A) claim for relief.

Therefore, the Motion is denied as to the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(A).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Shawn A. Myers ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted as to the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(B), fraud in a written statement of debtor's financial condition, and such claim is dismissed.
>
> **IT IS FURTHER ORDERED** that the Motion is denied as to the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(A), actual fraud.

**4.** **20-20168-E-7** **SHAWN MYERS**
**20-2023**

**ADRIAN, JR. V. MYERS**

**CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT ARISING FROM FRAUD AND DECEIT BY THE DEBTOR TO THE PLAINTIFF**
**3-12-20 [7]**

Plaintiff's Atty: Pamela Nelson
Defendant's Atty: Len ReidReynoso

Adv. Filed: 3/5/20
Answer: none
Amd. Cmplt. Filed: 3/12/20
Answer: 4/1/20
Amd. Answer: 4/20/20

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny

Notes:
Scheduling order -
Initial disclosures by 6/5/20
Close of discovery 7/16/20
Dispositive motions heard by 9/3/20

Motion to Dismiss the Adversary Complaint for Failure to State a Claim filed 8/14/20 [Dckt 23]; Withdrawal of Testimony and Documentary Evidence on Motion to Dismiss filed 9/2/20 [Dckt 30], set for hearing 9/24/20 at 11:00 a.m.

**The Pre-Trial Conference is continued to 2:00 p.m. on xxxxxxx**

**NOVEMBER 12, 2020 CONTINUED PRE-TRIAL CONFERENCE**

On September 17, 2020, Plaintiff filed a pleading titled "Settlement Conference Statement" and Defendant-Debtor filed a pleading titled "Pretrial Statement." Beginning with Plaintiff's Statement, it begins with a statement of facts. It then has a statement of claims and defenses, in which Plaintiff states he is asserting a breach of contract claim and fraud claim. He further states an Equitable Remedies claim for relief in the form of the court ordering that the property for which Plaintiff co-signed the loan be sold and the debt to the lender paid.

While the Settlement Conference Statement says that Plaintiff is seeking equitable relief, the

Amended Complaint is clear on its face, the only relief sought is for a determination of the monetary damages alleged to have been suffered by Plaintiff and for those damages to be determined nondischargeable. Amended Complaint, Dckt. 7. The Amended Complaint does not seek to have the court subsequently determine what portion of damages in the pre-petition State Court Action against Defendant-Debtor would be nondischargeable. No relief from the stay has been granted in Defendant-Debtor's bankruptcy case for Plaintiff to prosecute the State Court Action and bring any judgment therein back to this court.

The Settlement Conference Statement does not contain the required information for the Pre-Trial Conference as set forth in this court's May 28, 2020 Scheduling Order (Dckt. 21) - such as identification of witnesses, documentary evidence.

Defendant's Pre-Trial Conference Statement does contain the required information. Dckt. 37.

Though Plaintiff has had Defendant's Pre-Trial Conference Statement since mid-September 28, 2020, no corrective action has been taken by Plaintiff.

At this juncture, the court cannot proceed to trial setting, Plaintiff not having complied with the court's prior order. While it can well be anticipated that Defendant would scream (in a polite, courtroom appropriate voice) for the court to set a trial for which Plaintiff would nave no witnesses and no documentary evidence, such would clearly be inconsistent with established law in this Circuit. *See Kostecki v. Sutton (In re Sutton)*, 2015 Bankr. LEXIS 4084 (B.A.P. 9th Cir. 2015), for a discussion in unpublished decision, which cites published decisions, in which the Bankruptcy Appellate Panel discusses the appropriateness of a debilitating sanction due to failure to follow scheduling orders.

Plaintiff's failure to comply with this court's Scheduling Order now necessitates having to continue this Pre-Trial Conference. As such, Counsel for Defendant has spent non-productive time in preparing for and attending the Pre-Trial Conference. Fortunately for Plaintiff, this Pre-Trial Conference was heard in conjunction with Defendant's Motion to Dismiss, which was partially granted.

In substance, there is little additional time that the court perceives that Defendant Counsel incurred for the non-productive Pre-Trial Conference. By a thin reed Plaintiff misses having to pay corrective sanctions for several hours of Defendant's counsel's time.

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 Pre-Trial Conference having been conducted by the the court, Plaintiff having not filed a Pre-Trial Conference Statement, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Pre-Trial Conference is continued to 2:00 p.m. on **XXXXXXX**.
>
> The court has not ordered the payment of corrective sanctions in light

of Defendant's counsel having to appear at the November 12, 2020 calendar for Defendant's Motion to Dismiss, which was set at the same time and date as the Pre-Trial Conference.

**5.** **20-20168-E-7 SHAWN MYERS** **CONTINUED STATUS CONFERENCE**
**20-2038** **RE: COMPLAINT**
**KRZEWICKI V. MYERS** **4-6-20 [1]**

Plaintiff's Atty: Robert J. Enos
Defendant's Atty: Len ReidReynoso

Adv. Filed: 4/6/20
Answer: 5/1/20

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud

Notes:
Continued from 9/23/20 to allow the Parties additional time in addressing issues arising in this Adversary Proceeding.

**The Status Conference is xxxxx.**

**NOVEMBER 12, 2020 STATUS CONFERENCE**

No Status Conference updates have been provided by either Party. At the Continued Status Conference, **xxxxxxx**

**SEPTEMBER 23, 2020 CONTINUED STATUS CONFERENCE**

The court continued the Status Conference to allow the parties additional time in addressing issues arising in this Adversary Proceeding.

**SUMMARY OF COMPLAINT**

Robert Krzewicki ("Plaintiff") has filed a Complaint to determine the nondischargeability of an obligation asserted to be owed to him by Defendant-Debtor. Nondischargeability is sought pursuant to 11 U.S.C. § 523(a)(2)(A) and (B).

**SUMMARY OF ANSWER**

Shawn Meyers ("Defendant-Debtor") has filed an Answer, Dckt. 7, that admits and denies

specific allegations in the Complaint.

**FINAL BANKRUPTCY COURT JUDGMENT**

Plaintiff Robert Krzewicki alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(i) and (j). Complaint ¶ 2.1, Dckt. 1. In the Answer, Defendant Shawn Myers admits the allegations of jurisdiction and core proceedings. Answer, ¶¶ 2.1, 2.2, Dckt. 7. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

**JOINT STATUS CONFERENCE STATEMENT AND DISCOVERY PLAN**

The Parties filed their Joint Status Statement and Discovery Plan on June 24, 2020. Dckt. 10. Plaintiff projects having discovery completed in 120 days. Plaintiff reports that due to other trial commitments, Plaintiff's counsel cannot be ready for trial until February 2021.

Defendant proposes that the parties use written testimony and exhibits in lieu of a trial.

**ISSUANCE OF PRE-TRIAL SCHEDULING ORDER**

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

a. Plaintiff Robert Krzewicki alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(i) and (j). Complaint ¶ 2.1, Dckt. 1. In the Answer, Defendant Shawn Myers admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 2.1, 2.2, Dckt. 7. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before **xxxxxxx, 2020**.

c. Expert Witnesses shall be disclosed on or before **xxxxxxx , 2020**, and Rebuttal Expert Witnesses, if any, shall be disclosed on or before **xxxxxxx, 2020**.

d. Discovery closes, including the hearing of all discovery motions, on **xxxxxxx, 2021**.

e. Dispositive Motions shall be heard before **xxxxxxx, 2021**.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at **2:00 p.m. on xxxxxxx, 2021.**

# FINAL RULINGS

**6.** **17-26125-E-7 19-2115** **FIRST CAPITAL RETAIL, LLC HUSTED V. ESBF CALIFORNIA, LLC** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT 3-20-20 [19]**
**6 thru 7**

**Final Ruling:** No appearance at the November 12, 2020 Status Conference is required.
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Plaintiff's Atty: Aaron A. Avery
Defendant's Atty: Michael W. Davis; Thomas R. Phinney

Adv. Filed: 9/11/19
Answer: none
Amd. Cmplt. Filed: 3/20/20
Answer: none

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

Notes:
Continued from 9/24/20 to allow the Parties to consummate the Settlement Agreement.

[PP-1] Notice of Dismissal of Motion to Dismiss the First, Third, Fourth, and Fifth Claims for Relief in the Trustee's First Amended Complaint for Failure to State a Claim; Motion for More Definite Statement filed 10/27/20 [Dckt 60]

> **The Status Conference is continued to 2:00 p.m. on January 6, 2021,** to afford the Parties the time to consummate the Settlement and dismiss this Adversary Proceeding.

**NOVEMBER 12, 2020 STATUS CONFERENCE**

On September 30, 2020, the court granted the Motion of the Plaintiff-Trustee to approve a settlement of the claims in this Adversary Proceeding. 17-26125; Civil Minutes and Order, Dckts. 636, 638. In the Status Report filed on September 17, 2020, the Plaintiff-Trustee reports that this Adversary Proceeding will be dismissed upon performance of the Settlement by Defendant.

On October 27, 2020, Defendant dismissed its Motion to Dismiss various Causes of Action, as provided in the Settlement that has been approved by the court. Dckt. 60.

**7.** **17-26125-E-7 19-2115** **FIRST CAPITAL RETAIL, LLC PP-1**

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

**HUSTED V. ESBF CALIFORNIA, LLC**

**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the November 12, 2020 hearing is required.

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**The Motion to Dismiss For Failure to State a Claim was dismissed without prejudice, and the matter is removed from the calendar.**

ESBF California, LLC ("Defendant") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss For Failure to State a Claim was dismissed without prejudice, and the matter is removed from the calendar.**