

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 14, 2018 at 2:00 p.m.

-
1. [18-26415-E-11](#) MAXIMUS US, LLC STATUS CONFERENCE RE:
VOLUNTARY PETITION
10-11-18 [1]

Debtor's Atty: W. Steven Shumway

The Status Conference is continued to 2:00 p.m. on ~~xxxxxxx~~, 2018.

Notes:

Status Report [of Debtor] filed 11/2/18 [Dckt 22]

Status Report of Creditor Darrell Klotzbach et al. filed 11/7/18 [Dckt 24]

November 14, 2018 Status Conference

Status Report

On November 2, 2018, the Debtor in Possession filed its Status Report. Dckt. 22. It is reported that the Debtor purchased the Colfax Hotel on May 15, 2013 from the bankruptcy estate of James Payne (Case No. 11-033534). The Debtor is stated to have been remodeling the building to be a mixed use retail and office building.

In 2017, the City of Colfax presented Debtor with a list of 27 items to be corrected in the commercial property. The Debtor in Possession reports that 26 were completed by Debtor. Due to a dispute with a City Inspector, the Debtor in Possession reports that the City shut down the project.

The Debtor in Possession is talking with investors who are interested in the project if the above dispute can be resolved.

The Debtor has filed a statement that this is a Single Asset Real Estate Case. Dckt. 30.

At the Status Conference it was reported **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**

**Review of Schedules and
Statement of Financial Affairs**

This Chapter 11 case was commenced on October 11, 2018. On Schedule A/B Debtor has listed owning an 11,000 square foot commercial building with a value of \$700,000. The only asset listed by Debtor is a checking account with a \$100 balance.

The Debtor states that it has no other assets, including no: (1) deposits, (2) accounts receivables, (3) investments, (4) inventory, (5) office furniture, equipment or fixtures, or (6) machinery or equipment. Schedule A/B, Dckt. 15. Debtor further states that it has no executory contracts or unexpired leases. Schedule G, *Id.*

For Creditors, Debtor states in the Schedules the following:

1. Secured claims, Schedule D

Creditor	Amt. of Claim	Collateral
City of Colfax	(\$50,000)	Commercial Bldg
PMC Lender Services	(\$471,824.95)	Commercial Bldg

2. Priority Unsecured Claims

None

3. General Unsecured Claims

None

Id.

In the Statement of Financial Affairs the only gross income reported by Debtor is: \$20,000 in capital contributions in 2018, \$60,000 in capital contributions in 2017, and \$150,000 in loan proceeds in 2016. Debtor does not report any other income.

2. [16-28316-E-13](#) **SHARRY STEVENS-GOREE** **CONTINUED PRE-TRIAL**
[17-2070](#) **CONFERENCE RE: COMPLAINT**
 STEVENS-GOREE V. CITIZENS **FOR DECLARATORY RELIEF,**
 EQUITY FIRST CREDIT UNION **VIOLATION OF THE AUTOMATIC**
 STAY AND RELATED STATE AND
 FEDERAL CAUSES OF
 ACTION
 4-28-17 [1]

Plaintiff's Atty: Gary Ray Fraley; Paramprit Singh Bindra
Defendant's Atty: Mark K. Worthge; Ji Yeon Yoo

Adv. Filed: 4/28/17
Answer: 5/31/17

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 1:30 p.m. on December 11, 2018.

Notes:

Continued from 10/10/18. Defendant's counsel reported that the settlement agreement form and the dismissal should be filed soon.

NOVEMBER 14, 2018 STATUS CONFERENCE

Though seventy-seven (77) days have passed since Plaintiff and Defendant have represented to the court that they needed a mere fourteen (14) days to have the settlement agreement executed and the dismissal documents prepared (Stipulation ¶¶ 1, 2; Dckt. 29) this Adversary Proceeding has not been dismissed.

The court has respected the representations made by the Parties and their respective counsel (which are made with the certifications provided in Federal Rule of Bankruptcy Procedure 9011) in continuing the Status Conference and not pressing them to diligently fulfill their obligations to prosecute this Adversary Proceedings.

The respective attorneys not having fulfilled their commitment to the court, it appears necessary for the court to impose a corrective sanction to be paid each by the Plaintiff's Counsel and the

Defendant's Counsel, computed as follows:

1. \$250.00, each, if a dismissal of this Adversary Proceeding is not filed by noon on November 28, 2018.
2. An additional \$500.00, each, if a dismissal of this Adversary Proceeding is not filed by noon on December 7, 2018.

The Status Conference is continued to 1:30 p.m. on December 11, 2018 (specially set date and time), for the court to set a reasonable discovery schedule and pretrial conference for the diligent prosecution of this Adversary Proceeding.

At the Status Conference **XXXXXXXXXXXXXXXXXXXXXX**

OCTOBER 10, 2018 STATUS CONFERENCE

On August 29, 2018, Plaintiff and Defendant filed a Notice of Settlement and that a dismissal will be filed. Dckt. 26. As of the court's October 6, 2018 review of the Docket, no dismissal had been filed. The Defendant's counsel reported that the new management staff assigned to this matter has now "approved" the settlement agreement form and the dismissal should be filed soon.

3. [17-25221-E-13](#) [18-2099](#) TOMMIE RICHARDSON CONTINUED STATUS CONFERENCE
RE: COMPLAINT
6-20-18 [1]
RICHARDSON, JR. V. SENECA
LEANDRO VIEW, LLC.

Final Ruling: No appearance at the November 14, 2018 Status Conference is required.

ADVERSARY DISMISSED 11/6/18

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: unknown

Adv. Filed: 6/20/18
Answer: none

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

The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.

Notes:
Adversary proceeding dismissed by order dated 11/6/18 [Dckt. 9]

4. [11-44540-E-13](#) [18-2041](#) **MERCEDES PEREZ** **CONTINUED STATUS CONFERENCE**
RE: COMPLAINT
4-5-18 [1]
PEREZ V. STOCKTON MORTGAGE

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 4/5/18
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 1:30 p.m. on December 4, 2018. If Plaintiff-Debtor has not timely filed and served a motion for entry of default judgment, the Complaint shall be dismissed with prejudice.

Notes:
Continued from 9/5/18 to afford Plaintiff-Debtor the opportunity to prosecute a motion for entry of default judgment.

NOVEMBER 14, 2018, 2018 STATUS CONFERENCE

This Adversary Proceeding was commenced on April 5, 2018. Two hundred and twenty-two (222) days have elapsed since the Complaint was filed. On August 3, 2018, the court entered the default of defendant Stockton Mortgage, with Plaintiff-Debtor to file a motion for entry of default within thirty days thereof. Order, Dckt. 9. At he September 5, 2018 Status Conference Plaintiff-Debtor requested that he be afforded the further opportunity to prosecute a motion for entry of default judgment.

Though the court granted further time, Plaintiff-Debtor has not sought the entry of a default judgment. Nothing has been filed in this Adversary Proceeding has been filed by the Plaintiff-Debtor since the August 8, 2018 request for entry of the Defendant's default.

At the hearing, Counsel for Plaintiff-Debtor explained, **XXXXXXXXXXXXXXXXXXXXXXXXXX**

The Plaintiff-Debtor having failed to prosecute this case, the court continues the Status Conference to 1:30 p.m. on December 4, 2018 (specially set date and time). The court will further order that if the Plaintiff-Debtor has not filed and served a motion for entry of default judgment; which is supported by competent and properly authenticated evidence; including a Certificate of Service documenting service having been made by noon on November 28, 2018, the court shall dismiss the Complaint with prejudice due to the lack of prosecution.

SEPTEMBER 5, 2018 STATUS CONFERENCE

The Default of Defendant Stockton Mortgage having been entered, the Status Conference is continued to afford Plaintiff-Debtor the opportunity to prosecute a motion for entry of default judgment.

The Court shall enter an order in substantially the following form:

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

The Continued Status Conference in this Adversary Proceeding commenced filed by Mercedes Perez, the Plaintiff-Debtor (“Plaintiff-Debtor”) having been conducted by the court, Plaintiff-Debtor having failed to file a motion for entry of default judgment as ordered by the court (Order, Dckt. 9) and having failed to file such motion after further continued by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Status Conference is continued to 1:30 p.m. on December 4, 2018.

IT IS FURTHER ORDERED that if Plaintiff-Debtor has not filed and served a motion for entry of default judgment; which is supported by competent and properly authenticated evidence; including a Certificate of Service documenting service having been made by noon on November 28, 2018, the court shall dismiss the Complaint with prejudice due to the lack of prosecution, without further notice or hearing.

5. [11-44540-E-13](#) **MERCEDES PEREZ**
[18-2042](#)

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
4-5-18 [1]

PEREZ V. CAMP

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 4/5/18
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 1:30 p.m. on December 4, 2018. If Plaintiff-Debtor has not timely filed and served a motion for entry of default judgment, the Complaint shall be dismissed without prejudice.

Notes:
Continued from 9/5/18. Counsel for Plaintiff-Debtor explained that Mr. Camp is deceased and he is now having to try and locate a successor.

NOVEMBER 14, 2018, STATUS CONFERENCE

As disclosed at the prior Status Conferences, Plaintiff-Debtor Mercedes Perez has not prosecuted this Adversary Proceeding. The Complaint was filed on April 5, 2018. The Plaintiff-Debtor has been prosecuting this case Adversary Proceeding for two hundred and twenty (220) days. Plaintiff-Debtor has reported to the court that the named Defendant William Camp is deceased and Plaintiff-Debtor has not identified a successor in interest.

At the hearing, Counsel for the Plaintiff-Debtor explained **XXXXXXXXXXXXXXXXXXXX**

The Plaintiff-Debtor being unable to prosecute this case, the court continues the Status Conference to 1:30 p.m. on December 4, 2018 (specially set date and time). The court will further order that if the Plaintiff-Debtor has not filed and served a motion for entry of default judgment; which is supported by competent and properly authenticated evidence; including a Certificate of Service documenting service having been made by noon on November 28, 2018, the court shall dismiss the Complaint without prejudice due to the lack of prosecution.

SEPTEMBER 5, 2018 STATUS CONFERENCE

Nothing further has been filed by Plaintiff-Debtor since the July 11, 2018 Status Conference. Counsel for the Plaintiff-Debtor explained, that Mr. Camp is deceased and he is now having to try and locate a successor.

JULY 11, 2018 STATUS CONFERENCE

Counsel for Plaintiff reports that the address they had for Defendant may not be accurate and he has an investigator reviewing the matter. Plaintiff requested a continuance.

SUMMARY OF COMPLAINT

Mercedes Perez ("Plaintiff-Debtor") filed her twenty-three (23) page Complaint on April 5, 2018. Dckt. 1. The twenty-three page Complaint is titled: "Complaint for Declaratory Relief to Void Liens Pursuant to 11 U.S.C. § 506(a); Related Stated Causes of Action; Determination of Dischargeability of Debt Under FRBP § [sic] 4007."

In the Complaint, Plaintiff-Debtor alleges that in her related Chapter 13 case she completed her Plan and obtained her discharge. In her Chapter 13 Case, Plaintiff-Debtor obtained an order pursuant to 11 U.S.C. § 506(a) that Defendant William Camps' secured claim had a value of \$0.00 as a secured claim.

The First Cause of Action is titled as one for "Declaratory Relief," that being one in which no immediately effective judgment effecting the rights of the parties, but merely a "declaration" of their respective rights so that their future conduct can be conducted accordingly and they can avoid creating damage to the other.^{FN.1.}

FN.1. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-1 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Plaintiff-Debtor states that she seeks a declaratory judgment that voids the second and third deeds of trust securing Defendant' claim, and "thereby quieting title" to the real property. Plaintiff-Debtor then requests that the declaratory judgment "contain language" equivalent to a deed of reconveyance for the second deed of trust. Such language are pleaded to "in effect, 'quiet title' of Plaintiff[-Debtor]."

Then, buried in paragraph 37 of the Complaint, Plaintiff-Debtor further requests the following "declaratory relief" as part of the First Cause of Action:

"37. Pleading alternative theories, that if Defendant contends that only the in personam liability has been discharged, Plaintiff seeks, pursuant to FRBP §007(a)-(b), a determination that both the in personam and in rem liability of the debt has been fully discharged and any security interest voided."

Though Plaintiff-Debtor does not have to provide a points and authorities with the Complaint, the court is unsure as to what legal authority there is for a "discharge" of "in rem liability" or the legal concept of "in rem liability."

For a Second Cause of Action, Plaintiff-Debtor seeks relief pursuant to California Civil Code § 2941(d) based on Defendant' failure to reconvey the second and third deeds of trust after the Plaintiff-Debtor' Chapter 13 Plan was completed, the valuation of Defendant' secured claim pursuant to 11 U.S.C. § 506(a) having become the final "contract" by completion of the Plan, there being no obligation left owing to Defendant being secured by the second and third deeds of trust, and Defendant then failing to reconvey the second and third deed of trust as required by California law. Plaintiff-Debtor seeks actual and statutory damages pursuant to California Civil Code § 2941 and on other state law grounds. ^{FN.2.}

FN.2. This court, now more than several years ago, addressed the interplay between state and federal bankruptcy law concerning deeds of trust for which the secured claim is valued pursuant to 11 U.S.C. § 506(a) and the effect of completion of the bankruptcy plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013); *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff.*, 469 B.R. 803 (E.D. Cal. 2012).

Plaintiff-Debtor also requests statutory and contractual attorney' fees and costs, in addition to actual, statutory, and punitive damages.

SUMMARY OF ANSWER

No answer has been filed by William Camp, the named Defendant.

NO CERTIFICATE OF SERVICE

The Complaint was filed and the Summons was issued on April 5, 2018. No certificate of service of the Summons and Complaint has been filed by Plaintiff-Debtor.

The Court shall enter an order in substantially the following form:

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

The Continued Status Conference in this Adversary Proceeding commenced filed by Mercedes Perez, the Plaintiff-Debtor (“Plaintiff-Debtor”) having been conducted by the court, Plaintiff-Debtor having failed to file a motion for entry of default judgment as ordered by the court (Order, Dckt. 9) and having failed to file such motion after further continued by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Status Conference is continued to 1:30 p.m. on December 4, 2018.

IT IS FURTHER ORDERED that if Plaintiff-Debtor has not filed and served a motion for entry of default judgment; which is supported by competent and properly authenticated evidence; including a Certificate of Service documenting service having been made by noon on November 28, 2018, the court shall dismiss the Complaint without prejudice due to the lack of prosecution, without further notice or hearing.

6. [16-27854-E-11](#) **GARY STEINGROOT** **CONTINUED STATUS CONFERENCE**
VOLUNTARY PETITION
11-29-16 [1]

Debtor's Atty: Edward A. Smith

The Status Conference is concluded and the Matter is Removed From the Calendar, the court having ordered this case dismissed.

Not
es:

Continued from 9/20/18. The court having announced the ruling to grant the motion to dismiss this case, with the entry of the order delayed until final reports filed and U.S. Trustee fees paid.

Operating Reports filed: 9/28/18, 11/1/18

NOVEMBER 14, 2018, 2018 STATUS CONFERENCE

The court has approved the counsel for the Debtor in Possession legal fees and expenses. Order, Dckt. 241. That was the one remaining issue to be concluded in this case. That being completed, the case may be dismissed and this matter concluded.

At the Status Conference **XXXXXXXXXXXXXXXXXX**

SEPTEMBER 20, 2018 STATUS CONFERENCE

The court having announced the ruling to grant the motion to dismiss this case, with the entry of the order delayed until the final reports filed and U.S. Trustee fees paid, the Status Conference is continued.

7. [16-27854-E-11](#) **GARY STEINGROOT**
[UST-1](#)

**CONTINUED MOTION TO CONVERT
CASE TO CHAPTER 7 AND/OR
MOTION TO DISMISS CASE**

6-1-18 [178]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and parties requesting special notice on June 1, 2018. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

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

The Motion to Dismiss the Chapter 11 Bankruptcy Case is granted, and the case is dismissed.

November 11, 2018 Continued Hearing

The court granted the Motion for Compensation for counsel for the Debtor in Possession. Order, Dckt. 241. There are no remaining outstanding items for the court to address prior to dismissal of this Case.

**REVIEW OF MOTION
AND
RULING**

This Motion to Convert the Chapter 11 bankruptcy case of Gary Steingroot ("Debtor in Possession") has been filed by the United States Trustee, Tracy Hope Davis ("Movant"). Movant asserts that the case should be dismissed or converted because Debtor in Possession is time-barred under 11

U.S.C. § 1129(e) from confirming the pending amended plan and because the automatic stay has been lifted as to Debtor in Possession's real property.

Movant argues that September 25, 2017, was the three-hundredth day post-petition and was the last day that Debtor in Possession could file a plan and comply with 11 U.S.C. § 1121(e)(2). An Amended Plan was filed on September 14, 2017, and Movant concurs that the 300-day deadline was satisfied.

Movant argues, however, that October 30, 2017, was the forty-sixth day following filing of the Amended Plan and was the last day that Debtor in Possession could confirm the plan and comply with 11 U.S.C. § 1129(e) without obtaining an extension of the deadline.

The court entered an order on October 26, 2017, setting a confirmation hearing on December 19, 2017. Dckt. 119. Then, on December 21, 2017, the court entered an order continuing the hearing to 11:30 a.m. on January 17, 2018, which was amended by an order on December 27, 2017, setting the matter for hearing at 2:00 p.m. on January 17, 2018. Dckt. 163, 164.

Where Movant places the brunt of its argument is at what happened next in the case. Movant argues that after the January 17, 2018 hearing there is no conceivable order extending the confirmation deadline, merely civil minutes indicating a continued hearing. *See* Dckt. 167. Because of there being no order, Movant argues that Debtor in Possession cannot confirm a plan in line with 11 U.S.C. § 1129(e).

Additionally, Movant argues that cause exists to dismiss or convert this case because the court's order entered on December 11, 2017, stated that the automatic stay would be lifted for Citizens Bank, N.A. FKA RBS Citizens, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed recorded against Debtor in Possession's property effective July 1, 2018. *See* Dckt. 147.

In the Memorandum of Points and Authorities filed with the Motion, Movant indicates that conversion may be better for creditors in this case because there is over \$50,000.00 in cash to be distributed. Dckt. 180 at 5.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on July 5, 2018. Dckt. 199. Debtor in Possession argues that grounds have not been shown that favor converting or dismissing this case. Debtor in Possession stresses that Movant did not oppose the prior continuances of the confirmation hearing (in fact, did not even appear at the hearings).

Debtor in Possession also notes that the main and only piece of real property was authorized by the court to be sold on June 28, 2018, and the property was sold on June 29, 2018, with escrow closed. *Id.* at 2.

Debtor in Possession focuses on the lack of a written order continuing the confirmation hearing in January 2018 and argues that "entry of an order is not always necessary to effectuate it,

particularly when the parties had notice of the oral order.” *Id.* at 3–4 (quoting *Rodarte v. Estates at Monarch Cmty. Assoc. (In re Rodarte)*, No. CC-12-1276-HKiD, 2012 WL 6052046 (B.A.P. 9th Cir. Dec. 6, 2012) (citing *Noli v. Comm’r of Internal Revenue*, 860 F.2d 1521, 1525 (9th Cir. 1988); *Am.’s Servicing Co. v. Schwartz-Tallard*, 438 B.R. 313, 318 (D. Nev. 2010))). Debtor in Possession argues that the court’s implicit oral order arising from the January 17, 2018 civil minutes is that the confirmation deadlines were extended.

Debtor in Possession argues that there is a reasonable likelihood of rehabilitation in this case because the court approved the sale of Debtor in Possession’s real property, and that sale has closed, preventing any diminution in value from the automatic stay being lifted. Debtor in Possession believes that the proposed amended plan can be confirmed on July 11, 2018.

JULY 19, 2018, HEARING

At the July 19, 2018, hearing, the court continued the hearing on the Motion to August 16, 2018, at 10:30 a.m. to allow this Motion to be heard along with the Motion to Confirm Chapter 11 Plan. Dckt. 208.

DEBTOR IN POSSESSION’S SUPPLEMENTAL PLEADING IN RESPONSE TO MOTION FOR CONVERSION OR DISMISSAL

Debtor in Possession filed a Response August 2, 2108, consenting to dismissal of the Chapter 11 case after it has been fully administered. Dckt. 213. Debtor in Possession’s Response asserted the following grounds in support of dismissal:

- A. SunTrust Mortgage, Inc., the Class 1 secured creditor with filed Proof of Claim 1, was paid in full through the close of escrow. Thus, Debtor in Possession believes that SunTrust is not entitled to any further payment
- B. Capital One, the Class 2 unsecured creditor with scheduled claim 2.1, refused payment through and after the close of escrow, and recorded a total release of lien. This Total Release of Lien was recorded as Doc-2018-0046993-00. Exh. A. Thus, Debtor in Possession believes that Capital One is not impaired because 1) the Plan provides for payment in full, and/or 2) Capital One waived its claim by causing the total release of lien to be filed with the County through the close of escrow.
- C. Cach LLC, the Class 3 unsecured creditor with scheduled claim 4.3, is entitled to payment of \$9,874.79 through its counsel of record, Mandarin Law Group, LLP. Dckt. 25. Debtor in Possession proposes to send payment to that address from the proceeds of the sale in full satisfaction of Cach, LLC’s scheduled claim.
- D. All other general unsecured creditors, scheduled as claims 4.1, 4.2, and 4.4 through 4.11, are not allowed claims because they are time-barred

pursuant to California Code of Civil Procedure § 337. Dckt. 30, pp. 4–9. Thus, Debtor in Possession believes these claims are not entitled to payment.

- E. Debtor in Possession will file a motion for compensation to Debtor in Possession’s counsel pursuant to 11 U.S.C. § 330.
- F. Debtor in Possession will file a final report and final account of the administration of the estate pursuant to 11 U.S.C. §§ 1106 and 704(a)(9).
- G. Debtor in Possession requests that the Court grant UST’s motion to dismiss and the UST defer filing the order until the case is fully administered as follows: a) Cach, LLC is paid in full, b) the Court review Debtor in Possession’s motion to compensate its counsel of record, and c) Debtor in Possession files a final report and final account for the case.

In the alternative, Debtor’s Response opposes conversion of the Chapter 11 case to Chapter 7 because Debtor in Possession is in a position to fully administer the case.

AUGUST 16, 2018, HEARING

At the August 16, 2018, hearing, the court dismissed without prejudice the proceeding for Confirmation of the Chapter 11 Plan on the grounds the Debtor in Possession and U.S. Trustee are both seeking dismissal of the Chapter 11 case. Dckt. 226. The court continued the hearing on the Motion to Dismiss And/Or Convert one final time to September 20, 2018, at 10:30 a.m. to allow the Debtor in Possession to diligently prosecute the necessary motions for the administration of the bankruptcy estate prior to dismissal. Dckt. 227.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: “[f]irst, it must be determined that there is ‘cause’ to act[;] [s]econd, once a determination of ‘cause’ has been made, a choice must be made between conversion and dismissal based on the ‘best interests of the creditors and the estate.’” *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

DIP consents to Movant's Motion to Dismiss Chapter 11 Case on the basis that the case has been fully administered. The court notes that DIP's Motion for Approval of Final Distribution to Creditors scheduled to be heard the same day as this Motion has been tentatively granted.

As discussed in the Motion for Approval of Final Distribution, the DIP and its counsel have provided for all allowed claims and disbursed the monies of the Estate generated from the administration of Estate assets in the same priority as a Chapter 7. This decision has been made, with Debtor forgoing his discharge, to avoid further administrative costs and expenses if this case were converted. The requested dismissal properly provides for the interests of creditors, and allows Debtor move on to a "fresh start" outside of bankruptcy.

Cause exists to dismiss this case pursuant to 11 U.S.C. § 1112(b). The Motion is granted, and the case is dismissed.

The court notes that final closing tasks, including the filing of the Final Report, the payment of amounts allowed as compensation to Debtor in Possession's counsel in the concurrently filed application for fees, any amounts owing to the Office of the United States Trustee, and such other sums as may be necessary to conclude this case, may still be pending in this case. Therefore, the court is granting the Motion with the caveat that DIP prepare a proposed order, which upon Movant's approval and DIP's completion of its Final Report and other final closing tasks, shall be lodged with the court.

No further relief is granted.

The Court shall enter an order in substantially the following form:

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

The Motion to Convert or Dismiss filed by the U.S. Trustee 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 the case is dismissed.

8. [18-26358-E-13](#) TANESHIA WRAY

STATUS CONFERENCE RE: MOTION
TO EXTEND AUTOMATIC STAY
10-9-18 [9]

Debtor's Atty: Pro Se

**The Status Conference for the Request to Extend the Automatic Stay is
XXXXXXXXXXXXXXXXXX**

Notes:

Set by order of the court dated 10/10/18 [Dckt 11].

Motion for Extension of Time to File Schedules filed 10/23/18 [Dckt 18]; Order granting filed 10/25/18 [Dckt 20]; documents due 11/6/18

NOVEMBER 14, 2018, 2018 STATUS CONFERENCE

On October 8, 2018, Taneshia Wray, the Chapter 13 Debtor, sent a letter to the court "requesting a motion to stay" in this Chapter 13 case. Dckt. 9. She stated in the letter that the request is based on her having new (unidentified) employment and a desire to hire an attorney. *Id.*

Though stating that she desired to engage the services of counsel in this case, no attorney has substituted in to represent Debtor.

Debtor has filed four prior cases, which are summarized as follows:

Chapter 13 Case 18-21233 Represented by Counsel	Filed: March 2, 2018	Dismissed: July 13, 2018
	The bankruptcy case was dismissed due to Debtor being \$13,386.09 in default in her plan payments. 18-21233; Civil Minutes, Dckt. 62.	
Chapter 13 Case 17-26138 <i>Pro Se</i>	Filed: 17-26138	Dismissed: February 28, 2018

	<p>The bankruptcy case was dismissed when Debtor failed to file an amended plan within the additional seventy-five (75) days permitted by the court. 17-26138; Order, Dckt. 36. The order for filing an amended plan arose from the court's ruling on the Chapter 13 Trustee's Motion to Dismiss. These grounds are stated in the Court's Civil Minutes, summarized as: (1) the plan failed to provide the Chapter 7 liquidation value for creditors holding general unsecured claims; (2) the Debtor had failed to make any plan payments in the case; (3) Debtor failed to provide the Class 1 checklist; and (4) failure to disclose employment and VA disability benefits. <i>Id.</i>, Dckt. 27.</p>	
Chapter 13 Case 14-29053 Represented by Counsel	Filed: September 8, 2014	Dismissed: March 8, 2017
	<p>The Trustee's motion to dismiss was based on a two month default in payments, \$840.00. 14-29053; Motion, Dckt. 74; Order, Dckt. 77.</p>	
Chapter 7 Case 13-32466 Represented by Counsel	Filed: September 25, 2013	Discharge Entered: September 2, 2014
	<p>This case was commenced by the Debtor under Chapter 13 of the Bankruptcy Code. After failing to confirm a plan and attempting an amended plan, Debtor voluntarily converted the case to one under Chapter 7. 13-32466; Notice of Voluntary Conversion, Dckt. 66.</p>	

**REVIEW OF CHAPTER 13 PLAN,
SCHEDULES, AND FINANCIAL INFORMATION**

On November 6, 2018, the Debtor filed a Chapter 13 Plan. Dckt. Dckt. 24. The basic terms of the Plan are:

1. Monthly Plan Payment is \$3,040.57. Plan ¶2.01.
2. Plan Term is Sixty Months. *Id.*, ¶2.03.
3. For Class 1, the secured claim of Shellpoint Mortgage is listed to be paid the following-

A. \$84,000 pre-petition arrearage (0% interest).....\$1,400

B. Post-Petition Monthly Payment.....\$2,800

Id., ¶ 3.07(c).

4. No claims are provided in Class 2, Class 3, Class 4, Class 5, Class 6, or Class 7 (all left bank). *Id.*, ¶¶ 3.08, 3.09, 3.10, 3.12, 3.13, 3.14.

For Executory Contracts and Unexpired Leases, Debtor list IRS/FTB, with a post-petition monthly payment of \$240.57. *Id.*, ¶ 4.02.

On Schedule E/F Debtor states she has a pre-petition obligation owed to the IRS in the amount of \$11,019 and \$3,425.20 to the Franchise Tax Board. Dckt. 25 at 15. It appears that these claims are not provided for in the Plan, but treated as an executory contract.

Debtor also lists \$8,473.25 in general unsecured claims on Schedule E/F, but makes no provision for them in the Plan.

On Schedule I Debtor states having \$3,120 in gross wages and \$570.00 in disability benefits. On Schedule J Debtor lists having a household of one person. *Id.* at 25. For expenses Debtor lists:

1. Monthly mortgage payment of \$2,000 for Debtor's residence;
2. No maintenance or repair expenses Debtor's residence;
3. Only \$80 a month for food and housekeeping supplies;
4. \$100 for Vehicle maintenance, repairs, and registration;

Id. at 25-26.

On the Statement of Financial Affairs Debtor states that she has had no income from salary, wages, or business, or income from any other source, in 2018, 2017, or 2016. Statement of Financial Affairs Questions 4 and 5, *Id.* at 29.

By Debtor's calculations, even with the unreasonable expenses, Debtor states that she has only \$818.27 of monthly net income to fund a plan. Even if one adds back in the \$2,000 for mortgage payment (which is being paid through the Plan), the Debtor falls short the required amount for the mortgage, mortgage arrearage, and nondischargeable priority taxes stated in the Plan of \$3,040.

In Debtor's prior Chapter 13 case, Proof of Claim No. 3 filed by Bank of New York Mellon, Trustee, filed by Shellpoint Mortgage Servicing, stated a claim of (\$436,098.65), with a then pre-petition arrearage of \$172,304.31 (which is stated as only \$84,000 in the plan).

DISCUSSION

At the Status Conference ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

9. [17-27297-E-13](#) ARLEANER COLLINS
[PGM-1](#)

**PRE-EVIDENTIARY HEARING RE:
OBJECTION TO CLAIM OF
SACRAMENTO COUNTY TAX
COLLECTOR, CLAIM NUMBER 1-1
8-27-18 [38]**

Debtor's Atty: Peter G. Macaluso
County of Sacramento's Atty: Robert P. Parrish



Notes:

Debtor's Pre-Evidentiary Hearing Conference Statement filed 11/6/18 [Dckt. 69]

Debtor, Arleaner Collins ("Objector") requests that the court disallow the claim of the Sacramento County Tax Collector ("Creditor"), Proof of Claim No. 1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$30,127.05.

Objector asserts that Creditor's claim should be reduced to \$4,964.73. In support of this assertion, Objector states:

The debtor in this case, is an elderly women whom has resided in the home since it's purchase in May of 1970, and has never been vacant. Some time in 2013/2014, the County's records reflect that various "City Codes" were inputted into the records which reflected the subject property, commonly known as 1828 Jamestown Dr., Sacramento, CA. 95815 ("Property") as vacant. Dckt. 38 at 1:23-28.

In reviewing the Pre-Petition Sacramento County Secured Property Tax Bill 2012-2013, there are included referenced charges pursuant to "City Code 8.96.360 "Vacant Building Adm. Penalties" in the amount of \$750.00, and "Code Enforcement Fees" of \$1,600.00. And "Sacramento City Securement" of \$983.60. Id. at 3:15-19.

In reviewing the Post-Petition Sacramento County Secured Property Tax

Bill 2014-2015, there are included referenced charges pursuant to "City Code 8.96 in the amount of \$20,000.00, for "Vacant Building Adm. Penalties", and City Code 1.28 in the amount of \$1,000.00, for "Delinquent Administrative Penalties." Id. at 3:20-24.

The subject property was not vacant before the filing of case #14-32316, was not vacant during nor between this case and dismissal of the first case. Id. at 3:25-27.

The claimant Creditor has the affirmative burden of showing reasonableness as a matter of law. The objection, as here, need only note the absence of any such showing, and does not require evidence of support. Id. at 4:1-4.

In effect, the proof of claim to address an essential element of the substantive claim that the claimant asserts is favorable Rule 3001(f) evidentiary presumption regarding validity and amount that the basis of the fee includes charges for a "vacant" house which is obviously an error. Id. at 4:5-9.

Opposition

Creditor filed an Opposition to Debtor's Objection on October 2, 2018. Dckt. 57. Creditor asserts that the City of Sacramento began an enforcement action against Debtor on or around April 2011 after site inspection prompted by a broken front door and window, and ajar side bedroom window and garage door. Creditor asserts further that Debtor was issued citations for numerous violation which she could have appealed at the City's assessment. Debtor did not contest the citations and the City placed liens on Debtor's property during the 2012-2013 fiscal year. While Debtor claims the property was not vacant, several inspection indicated otherwise. Furthermore, Creditor notes Debtor has an out of state address on record.

Order for Pre-Evidentiary Hearing Conference

On October 22, 2018, the court issued a Pre-Evidentiary Hearing Conference Order. Dckt. 67. The Debtor filed her required Pre-Evidentiary Hearing Conference Statement on November 6, 2018. Dckt. 68. Debtor's Pre-Evidentiary Hearing Conference Statement includes the following:

- A. Debtor's Witnesses
 - 1. Arlene Collins
 - 2. Valerie Collins
- B. Documentary Evidence
 - 1. County of Sacramento Proof of Claim

2. Declaration of Debtor

No Pre-Evidentiary Hearing Statement was not filed by the County of Sacramento. The County of Sacramento has not presented any witnesses or documentary evidence to be presented in opposition to the Objection to Claim at the Evidentiary Hearing.

10. [17-27397-E-13](#) **GEVORG/ARMINE POLADYAN** **CONTINUED MOTION TO DISMISS**
[18-2014](#) **PLC-2** **ADVERSARY PROCEEDING**
TRIVEDI V. POLADYAN ET AL **6-11-18 [34]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney and Office of the United States Trustee on June 11, 2018. By the court's calculation, 29 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, and Defendant-Debtor shall file an answer on or before November 29, 2018.

Continuance From July 31, 2018 Prior Hearing and Status of Proceedings

At the July 31, 2018 hearing, the Parties made an oral motion to stay this Adversary Proceeding, the Defendant Debtor advising the court that he was proceeding with a Chapter 13 Plan to provide for payment of Plaintiff's claim. Further, it was stated that the underlying dispute concerning the amount of the obligation, if any, will be addressed in an objection to claim. It appears that Defendant Debtor would be able to fund the plan even if Plaintiff's claim is allowed in full. Civil Minutes, Dckt. 52. The court stayed this adversary proceeding pending the court conducting a review at the November 14, 2018 Status Conference and a review of how the bankruptcy case and claim objection were proceeding. Order, Dckt. 53.

The Civil Minutes from the July 31, 2018 Status Conference provide further background for the court's decision to stay this Adversary Proceeding, including, "The parties are negotiating a settlement through a Plan, and requested that the hearing be continued." Dckt. 51 at 1.

Plaintiff Tapan Trivedi, Administrator for Estate of Ortansa Ambrus-Cernat, filed a Status Report on November 7, 2018. Dckt. 55. Plaintiff states that this case was converted from one under Chapter 7 to one under Chapter 13 based on Defendant-Debtor's representations that they would fund a plan with \$4,000 a month payments and provide for a 100% dividend to creditors holding general unsecured claims. Plaintiff assert that it was further represented that such a plan, providing for payment in full, would obviate the need for this Adversary Proceeding.

The court's Civil Minutes from the June 6, 2018 hearing on the Motion to Convert recounts the representations made to the court, creditors, and other parties in interest. In making these statements, Debtors were represented by counsel.

This is the debtors' motion to convert this chapter 7 case to a case under chapter 13 of the Bankruptcy Code. The court continued the hearing to allow the debtors to attend the meeting of creditors, which they have done. The day before the last hearing, the creditor opposing the motion filed a supplemental opposition. The chapter 7 trustee has stated he does not oppose the motion.

Since the court prepared its initial tentative ruling, the debtors have taken steps that are persuasive in their favor. They have agreed to increase their plan payment from the \$1,000 per month originally proposed to \$4,405 per month, which represents all of their disposable income, attributable largely to the joint debtor's new job. They have also agreed they will propose a plan that will pay a 100% dividend to their general unsecured creditors. Although the debtors were not as forthcoming and candid in their statement of financial affairs as they should have been, that does not override the considerations that they are now proposing to devote all of their monthly disposable income to their plan and to propose a 100% plan. The court concludes the debtors have not forfeited their right to have the case converted to chapter 13; accordingly, the motion will be granted.

17-27398; Civil Minutes, Dckt. 52. In the Motion to Convert, Defendant-Debtor states that it intends on defending this Adversary Proceeding. *Id.*; Motion ¶¶ 11-12, Dckt. 16.

There is also pending before the court a Motion to Approve a Tolling Agreement between Defendant-Debtor and Outsource Legal Support.

Objection to Claim

Defendant-Debtor filed an Objection to Plaintiff's claim in Defendant-Debtor's bankruptcy case. *Id.*; Objection, Dckt. 67. However, on August 7, 2018, Defendant-Debtor filed an Ex Parte Motion (titled "Withdrawal") of the Objection to Claim. *Id.*, Dckt. 88. In dismissing the objection, the Proof of Claim is *prima facie* evidence of the obligation.

Chapter 13 Plan Status

Defendant-Debtor filed a proposed Chapter 13 Plan on June 26, 2018. *Id.*, Dckt. 61. The basic terms stated in the Plan were: (1) monthly plan payment of \$4,405.00 for 60 months; (2) No Class 1 Claims to be paid; (3) No Class 2 Claims to be paid; (4) No Class 3 Surrender Claims; (5) Debtor to Make Class 4 Payment of \$538; (6) No Class 5 and 6 Priority/Special Terms Unsecured Claims to be paid; and (7) an 100% Dividend for General Unsecured Claims Totaling \$233,434.16. This \$233,434.16 amount appears to necessarily include Plaintiff's unsecured claim (in light of the small balances of other unsecured claims filed in this case), but appears to understate the general unsecured claims as filed in light of Plaintiff's unsecured claim being filed in the amount of \$279,510.

The proposed Chapter 13 Plan caught the Objection of the Chapter 13 Trustee. *Id.*, Dckt. 72. Plaintiff also joined in the Objection. *Id.*, Dckt. 85. The agreement with Legal Support, LLC may resolve some of the grounds, but not all. One is based on the Debtor failing to disclose the gross income and expenses from Debtor's business. Based on historical data, the Chapter 13 Trustee asserted that the Schedule I and J information was not accurate. Plaintiff amplifies the Objection with his response, questioning the financial information provided by Debtor. *Id.*, Dckt. 85.

The court entered its order sustaining the Objection to Confirmation on August 24, 2018. No new plan and motion to confirm have been filed since that date.

Debtor has prosecuted a tolling agreement with Outsourced Legal Support, LLC.

REVIEW OF MOTION AND RULING

This Adversary Proceeding was commenced on February 14, 2018. It and the related bankruptcy case were transferred to the current judge on or about June 18, 2018.

Grevorg Poladyan and Armine Asatryan ("Defendant") move for the court to dismiss all claims against it in Tapan Trivedi's ("Plaintiff") Complaint according to Federal Rule of Civil Procedure

12(b)(6).

Defendant argues that this Adversary Proceeding is moot because Defendant's bankruptcy case was converted to Chapter 13 proposing a 100% plan. As discussed above, while proposing a plan, Debtor has not confirmed one and is not now prosecuting for confirmation of such plan.

REVIEW OF COMPLAINT

The Amended Complaint filed by Tapan Trivedi, as the Administrator for the Estate of Ortansa Ambrus-Cernat, the Plaintiff, asserts that the obligation owed by Debtor to Plaintiff is nondischargeable based on fraud, breach of fiduciary duty, and injury caused by willful and malicious conduct. The court summarizes the allegations in the Complaint as follows:

- A. In Superior Court for Sacramento County Case No. 34-2015-00188010, Amended Complaint ¶ 1, Dckt. 31.
- B. Defendant-Debtor Gevorg Poladyan filed an answer to the Complaint. *Id.* ¶ 3.
- C. On August 8, 2008, Ortansa purchased the Palmwood Property at a shortsale from Defendant-Debtors for \$180,000. *Id.*, ¶ 14. To finance the \$180,000 purchase, it is alleged that Defendant-Debtors agreed that Ortansa would refinance her home to fund the short sale purchase. *Id.*, ¶ 24.
- D. It is further alleged that “Defendants convinced Ortansa to borrow money on her home, purchase the Palmwood Property at foreclosure, transfer the Palmwood Property back to Defendants, and then refinance the home a [*sic*] repay the \$180,000.00 to Ortansa to save Defendants’ home.” *Id.*, ¶ 26.
- E. Defendant-Debtors (collectively) purchased the “Palmwood Property” from Ortansa for \$180,000 on April 30, 2011. *Id.*, ¶ 15.
- F. Defendant-Debtor promised—
 - 1. They would care for Ortansa’s mentally challenged son;
 - 2. They would refinance the Palmwood Property and “re-pay” Ortansa. *Id.* ¶¶ 16–18.
- G. On February 2, 2012, Ortansa executed the grant deed to transfer the Palmwood Property to Defendant-Debtors. *Id.*, ¶ 19.
- H. Defendant-Debtors signed a loan agreement for \$100,000 with

Outsourced Legal Support, LLC (“Outsourced”) on October 1, 2012, and a second loan agreement for \$80,000 with Outsourced on April 1, 2013. *Id.*, ¶¶ 20, 21. Defendant-Debtors encumbered the Palmwood Property with an additional \$50,000 obligation. *Id.*, ¶ 29.

- I. Defendant-Debtors did not, and it is alleged did not intend, to pay Ortansa the \$180,000 purchase price. *Id.*, ¶ 28.
- J. Ortansa died on May 20, 2014. *Id.*, ¶ 30.
- K. On November 5, 2017, Outsourced recorded the two deeds of trust for the \$100,000 2012 loan and the \$80,000 2013 loan. *Id.*, ¶ 36. Defendant-Debtors commenced their bankruptcy case on November 8, 2017 (three days later). *Id.* ¶ 34.
- L. In the First Cause of Action, Plaintiff merely requests that the court issue Declaratory Relief that the obligations of Defendant-Debtors would be nondischargeable if such litigation were to be commenced sometime in the future. *Id.* ¶¶ 36-37.
- M. In the Second Cause of Action, Plaintiff asserts that Defendant-Debtors’ obligation to pay the \$180,000 is nondischargeable because the statement that Defendant-Debtors would repay the loan was false when made, Defendant-Debtors having no such intention at that time. The Second Cause of Action includes additional allegations of:
 - 1. “Ortansa refinanced the Oak Property, for approximately \$180,000, which was used to purchase the Palmwood Property.” *Id.* ¶ 47.
 - 2. “Defendants referred to Ortansa as ‘mama’ and spent many hours with her.” *Id.* ¶ 48.
 - 3. “Defendants wrote and signed communication promising that they ‘will pay the loan as soon as possible.’” *Id.* ¶ 51.
 - 4. “Defendants had an ‘Agreement to Transfer Funds’ prepared on April 14, 2014, which defendant, Armina Astryan signed stating ‘the proceeds from the refinanced loan on 2242 Palmwood Ct., Rancho Cordova, CA will be assigned during escrow process to payoff the loan on the property 6005 Oak Ave, Carmichael, CA.’” *Id.* ¶ 52.

5. “55. Defendants made a materially false promise as no payments were ever made.” *Id.* ¶ 55. “Defendants refinanced the Palmwood property but did not repay the loan.” *Id.* ¶ 56.
6. “Defendants did not disclose the two notes with Outsource totaling \$180,000, to Pinnacle, nor in the loan application.” *Id.* ¶ 60.
7. Defendants refinanced the Palmwood property and purchased In-N-Out Honda, an auto wrecking yard. *Id.* ¶ 61.
8. “Plaintiff reasonably relied on the repayment to Ortansa as the Palmwood property was not encumbered at the time Ortansa’s loan was made. *Id.* ¶ 62.
9. “On August 22, 2018, Defendants conveyed two (2) Deeds of Trust, and a UCC-1 to Outsource.” *Id.* ¶ 63.

M. In the Third Cause of Action, Plaintiff asserts that, in light of the terms of the sale to Defendant-Debtors including promises for the case of Ortansa’s handicapped son, the obligation to pay the \$180,000 is nondischargeable “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” pursuant to 11 U.S.C. § 523(a)(4). Additional allegations in for the Third Cause of Action include:

1. “Plaintiff holds claims arising from for fraud or defalcation while acting in a ‘fiduciary capacity.’” *Id.* ¶ 67.
2. “Defendants had a close relationship with Ortansa.” *Id.* ¶ 68.
3. “Defendants made promises to care for Ortansa’s handicapped son after she died.” *Id.* ¶ 69.
4. “Defendants spent many hours with Ortansa and took her to church on a regular basis.” *Id.* ¶ 70.

N. In the Fourth Cause of Action, Plaintiff alleges that Defendant-Debtors are obligated to Ortana in the amount of \$210,000 “by failing to make any payments, failing to care for Ortana’s son resulting in his death, encumbering the property, causing willful and malicious injury to

Ortana's estate" pursuant to 11 U.S.C. § 523(a)(6). Additional allegations relating to the alleged willful and malicious conduct include:

1. "Defendants' caused willful and malicious injury to Ortansa by failing to repay the money loaned." *Id.* ¶ 76.

O. In the Fifth Cause of Action, Plaintiff alleges that Defendant-Debtors transferred property of the bankruptcy estate with the intend to hinder, delay, or default a creditor or officer of the estate within one year of the bankruptcy case and they should be denied a discharge pursuant to 11 U.S.C. § 727(b)(2)(A). Additional allegations relating to the alleged objection to discharge include:

1. "Defendants, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred property of the debtor within one year before the date of filing their Chapter 7 case." *Id.* ¶ 79.

In Paragraph 6 of the Amended Complaint, Plaintiff alleges that there were transfers made to Outsource Legal Support, LLC within thirty days of the bankruptcy case being filed by Defendants. Paragraph 7 of the Amended Complaint identifies a second deed of trust to secure a \$100,000 obligation, a third deed of trust to secure an \$80,000 obligation, and a UCC-1 financing statement (securing an unidentified obligation) filed against Defendants' business and assets.

It is further alleged in Paragraph 20 of the Amended Complaint that the loan agreement for the \$100,000 obligation was signed October 1, 2012 (citing to Exhibit 4, Dckt. 6), and in Paragraph 21, the loan agreement for the \$80,000 obligation was signed April 1, 2013 (citing Exhibit 5. Dckt. 6).

In Paragraph 34, it is alleged that the two deeds of trust were recorded and that the UCC-1 statement was filed on November 5, 2017. (Defendants' bankruptcy case was field on November 8, 2017.)

P. In the Sixth Cause of Action, Plaintiff asserts that the 2017 transfer to Outsource was made within ninety days of the commencement of the bankruptcy case and may be avoided pursuant to 11 U.S.C. § 544.

Q. In the Seventh Cause of Action, Plaintiff asserts that the transfers to Outsouce are avoidable as preferences pursuant to 11 U.S.C. § 547.

APPLICABLE LAW

A complaint must provide more than labels and conclusions, or a formulaic recitation of a cause of action; it must plead factual allegations sufficient to raise more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Federal Rule of Civil Procedure 8, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). As the Court held in *Twombly*, the pleading standard under Rule 8 does not require “detailed factual allegations,” but it does demand more than an unadorned accusation or conclusion of a cause of action. 550 U.S. at 555.

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. 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.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8 also requires that allegations be “simple, concise, and direct.” FED. R. CIV. P. 8(d)(1).

In ruling on a Rule 12(b)(6) motion to dismiss, 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 be reasonably drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

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).

PLAINTIFF’S OPPOSITION

Plaintiff filed an Opposition on June 25, 2018. Dckt. 46. Plaintiff argues that the Motion should be denied outright because it lacks any admissible evidence.

As to Rule 12(b)(6), Plaintiff argues that less specificity is required because Defendant has all of the necessary information to have full knowledge of promises made, evidenced by a chain of documents.

REVIEW OF MOTION

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

- A. Causes of action two, three, and four fail to meet the heightened standard of Federal Rule of Civil Procedure 9(b) for pleading fraud;
- B. The first cause of action for declaratory relief that a claim has been discharged fails because the court has not entered a discharge in the Chapter 7 case;
- C. The second cause of action does not identify a misrepresentation, the speaker, when and where statements were made, what documents contained representations, and how the representations are false or misleading;
- D. The third cause of action fails because it is merely conclusory;
- E. The fourth cause of action fails because it is merely conclusory;
- F. The fifth cause of action fails because “[t]here are no subparts;”
- G. The sixth cause of action does not state how Plaintiff was entitled to exercise the rights of a trustee, and the case was converted to Chapter 13, leaving avoidance powers with a debtor; and
- H. The seventh cause of action fails because Plaintiff does not state how Plaintiff had the right to exercise powers under 11 U.S.C. § 547, and the case has been converted to Chapter 13, which vested avoidance power in the debtor.

DISCUSSION

In reviewing the docket in Defendant’s open bankruptcy case, the court notes that no discharge has been entered. Plaintiff includes a confusing First Cause of Action seeking declaratory relief that Defendant’s claim has been discharged in Defendant’s bankruptcy case. Complaint ¶¶ 38 and 39; Dckt. 1. In the Opposition to the Motion, Plaintiff does not address this allegation and whether the reference to “Defendant’s” claim is to be “Plaintiff’s Claim.” Such would appear logical, in that the Plaintiff is the creditor of Defendant, the debtor.

As counsel in this District well knows, a request for “declaratory relief” is a request for specific relief as authorized by Congress for potential future claims that could arise if the parties cannot obtain a judicial determination of their asserted conflicting rights. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. “In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future.” *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit

requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. §2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief when there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Plaintiff now asserts that because Defendant’s related bankruptcy case has been converted to one under Chapter 13 and the Plan promises that unsecured claims will be paid in full, that has rendered the complaint “moot.” Because the Complaint has been rendered “moot,” then the court should stay the prosecution of the “moot” Complaint.

It appears that Plaintiff is using the word “moot” in an inaccurate way. As discussed in Moore’s Federal Practice-Civil, § 101.93, when a matter is “moot,” the party cannot receive and the court cannot issue any effective order or judgment for the rights that had been asserted.

Here, it appears that Plaintiff does not assert that the claims for nondischargeability have not been rendered moot, but only that in light of Defendant’s now proposing to pay the claim in full through a Plan, judicial economy and party resources are best served if the Adversary Proceeding is stayed. If so, Plaintiff or the Parties jointly may make such a request by separate motion, not merely slipping it in an opposition.

With respect to the First Cause of Action, the court is unsure what relief to grant. On its face,

Plaintiff appears to seek a determination (not mere declaratory relief) that the obligation owed to Plaintiff has been discharged. Such would normally be brought by the debtor as a motion for contempt for violation of the discharge injunction or by a creditor seeking a determination that the debt had not been discharged for specifically stated grounds.

It may be that Plaintiff may well have sought a “declaration” that the obligation owed to Plaintiff “would be in the future” nondischargeable if Plaintiff could provide the grounds for nondischargeability under 11 U.S.C. § 523(a)(2), (4), and (6). Such clearly is not a proper request for declaratory relief. If a creditor wants such a determination, the creditor must (even in a Chapter 13 case) timely file a complaint for determination that the debt is nondischargeable. 11 U.S.C. §§ 523(a), 1328(a)(2), (c); FED. R. BANKR. P. 4007.

In fact, the Second, Third, and Fourth Causes of Action seek relief pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). Those matters are properly before the court for adjudication and are not rendered moot merely by the conversion of the case to one under Chapter 13 and a promise that Debtor will pay claims in full over sixty months of a Chapter 13 plan.

Therefore, the Motion is granted as to the First Cause of Action seeking declaratory relief. Plaintiff must, and has, sought determinations of nondischargeability in this Complaint. Plaintiff must seek such determination, and not merely a “declaration” by the court that if Plaintiff were to pursue such claims sometime in the future then it is possible that nondischargeable relief could possibly be granted.

Second Cause of Action

The Second Cause of Action seeks a determination of nondischargeability based on 11 U.S.C. § 523(a)(2) fraud. Paragraph 38 in the Second Cause of Action incorporates all of the prior allegations by reference. From that, it appears clear that the relief is sought pursuant to 11 U.S.C. § 523(a)(2)(A) fraud, not the alternative grounds based on a written financial statement as provided in § 523(a)(2)(B).

Contrary to Defendant’s assertion that the allegations are not specific enough, such as not identifying the specific time or mode of statement, the Amended Complaint does provide adequate allegations. These include, which are identified by their paragraph numbers in the Amended Complaint (Dckt. 1, emphasis added):

14. On or about, August 8, 2008, Ortansa purchased the Palmwood Property at a short sale from Defendants for \$180,000.00.
15. On or about April 30, 2011, Ortansa sold the Palmwood Property to Defendants for \$180,000.
16. Defendants promised that they would care for her mentally challenged adult son.
17. Defendants promised that they would refinance the Palmwood property for and repay Ortansa.

18. Defendants promised to care to Ortansa's disabled son when she died.

19. On or about, February 2, 2012 Ortansa signed a grant deed to Defendants.

Exhibit 3 is a copy of a Grant Deed bearing the recording date of February 2, 2012. It is hand written and does not appear to have been prepared by an escrow or other real estate professional service agency. It states that Plaintiff transferred the Property to Defendant Armine Asatryan and that no transfer taxes are due because the transfer was for "no consideration."

There are specific representations asserted to have been made by Plaintiff, not merely a statement akin to "Defendant lied to me" or "Defendant did not do what was (nonspecifically stated) what he promised."

Plaintiff states that she fulfilled her part of the above agreement and that title was transferred to Defendants.

20. On October 1, 2012, Defendants signed a Loan Agreement, in the amount of \$100,000.00, with Outsourced legal Support, LLC. ("Outsourced"). See Exhibit #4.

21. On April 1, 2013, Defendants signed a Loan Agreement in the amount of \$80,000.00 with Outsourced. (See Exhibit #5).

Plaintiff specifically identifies the post-sale loans that were obtained by Defendants that conflict with the alleged contract terms to obtain \$180,000 by refinancing the property to pay Plaintiff. Then, Plaintiff goes further in Paragraph 81 of the Complaint to allege that Defendant's transfer to Outsource was for an antecedent debt for which they encumbered the property to pay the old debt ahead of doing the alleged required refinance to pay Plaintiff.

26. Defendants convinced Ortansa to borrow money on her home, purchase the Palmwood Property at foreclosure, transfer the Palmwood Property back to Defendants, and then refinance the home and repay the \$180,000.00 to Ortansa to save Defendants' home.

27. As agreed Ortansa purchased the Palmwood Property for \$180,000.00, as stated in the State Action, with the agreement that Defendants would care for Ortansa's disabled adult son after her death.

Plaintiff clearly asserts that Defendants "convinced" Plaintiff to borrow the money, did not comply with the alleged agreement, and that the terms of the agreement included the (nonspecific) provision to "care" for Plaintiff's adult son.

28. Defendants did not repay the loan from Ortansa, nor did Defendants have the intent to repay the loan when the agreement was formed.

29. Defendants intentionally encumbered the Palmwood Property with a \$50,000.00

loan, but did not pay Ortansa.

32. No payments were made to Ortansa's estate.

Defendant asserts that the above are mere "conclusory allegations of fraud . . . punctuated by a handful of neutral facts" that to be sufficient, the Complaint must state why such statements were fraudulent. As stated in one of the authorities cited by Defendant:

"Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *See Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 611 (9th Cir. 1977)."

Semegen v. Weidner, 780 F.3d 727, 731 (9th Cir. 1985).

Here, Plaintiff has specifically identified the alleged particular misconduct, the alleged promises, the failure to comply, the reliance of Ortansa, and the damages. While Defendants will want to conduct discovery to obtain all documents and witnesses, they know exactly the alleged fraud, when it is alleged to have occurred, and the nature of the damages alleged to flow from it.

As discussed in 2 Moore's Federal Practice—Civil § 9.03(b), the above adequately meets the requirements of Federal Rule of Civil Procedure 9 and Federal Rule of Bankruptcy Procedure 7009 [specifics for the Complaint shown in brackets]:

[b] Requirements of Particularity Depend on Facts of Case

The requirements of particularity under Rule 9(b) may differ with the facts of each case. However, the reference to "circumstances constituting fraud" usually requires the claimant to allege:

- The identity of the person who made the fraudulent statement;
[Defendants Gevorg Polandyan and Armine Asatryan]
- The time of the misrepresentation;
[April 30, 2011, February 2, 2012]
- The place of the misrepresentation;
[communications directly with Ortansa]
- The content of the misrepresentation;
[promise to refinance and pay \$180,000, and provide care for disabled son]
- The method by which the misrepresentation was communicated;
[in light of there being no written agreement it appears to have been orally]

communicated]

- The persons or entities to whom the misrepresentation was communicated; [Ortansa]; and
- The injury resulting from reliance on the misrepresentation. [\$180,000, damages flowing from being unable to repay loan obtained by Ortansa, and care of disabled son].

Nevertheless, plaintiffs are not absolutely required to plead the specific date, place, or time of each of the fraudulent acts, provided they use some alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

...
Because the complexity and other circumstances of each case **will determine the amount of specificity required, misrepresentations that are numerous and occur over extended periods of time may be alleged with somewhat less specificity.** In such cases, it would be impractical to detail every instance of fraudulent conduct. A complaint may be sufficient if it pleads a fraudulent scheme with particularity along with representative examples showing fraudulent conduct. **Moreover, Rule 9 must be read together with Rule 8, which requires that pleadings be “simple, concise, and direct.”** Excessive pleading of multiple instances of fraud might violate Rule 8.

Moore’s on Federal Practice continues in Section 903(c) discussing “conclusory allegations,” providing the following guidance:

For example, in a claim by employees and their wives against an employer for damages from alleged exposure to dangerous chemicals, allegations that defendants “actively practiced fraud upon the plaintiffs” by failing to warn them about the dangers of contamination were deemed insufficient.

Here, the allegations provided for Defendants are not mere conclusory statements, but what the specific fraud is alleged to be, who made the alleged misrepresentations, that Plaintiff relied, that Defendants did not intend to fulfill the alleged promises, and that Ortansa was damaged.

The Motion is denied as to the Second Cause of Action.

Third Cause of Action—11 U.S.C. § 523(a)(4)

Based on the above allegations, Plaintiff also seeks to have the obligation determined nondischargeable based on 11 U.S.C. § 523(a)(4) which provides that a debt will be nondischargeable if it is “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” It is alleged in Paragraph 46 of the Complaint that the allegations constitute such a claim because:

68. Defendants had a close relationship with Ortansa.

69. Defendants made promises to care for Ortansa's handicapped son after she died.

70. Defendants spent many hours with Ortansa and took her to church on a regular basis.

Defendants assert that the allegations of there being a fiduciary relationship is based on contentions that Defendants "[h]ad a close relationship with [Ortansa] and took her to church on a regular basis."

The court concurs that as pleaded in the Amended Complaint, Plaintiff does not state (even construing the allegations as most favorably to Plaintiff) a cognizable fiduciary relationship between Ortansa and Defendants. A relationship, yes. But having a close relationship, including attending church may show a situation of undue influence or explain why Plaintiff's reliance is justifiable, it is not a fiduciary relationship. As discussed in *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186 (9th Cir. 2001):

Whether a person is a fiduciary under §523(a)(4) is a question of federal law. *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996) (citing *Ragsdale v. Haller (In re Haller)*, 780 F.2d 794, 795 (9th Cir. 1986)). . . From 1884 to the present, courts have construed "fiduciary" in the bankruptcy discharge context as including express trusts, but excluding trusts *ex maleficio*, *i.e.*, trusts that arose by operation of law upon a wrongful act. *Davis v. Aetna Corp.*, 293 U.S. 328, 333, 79 L. Ed. 393, 55 S. Ct. 151 (1934); *Chapman v. Forsyth*, 43 U.S. 202, 2 HOW 202, 208, 11 L. Ed. 236 (1844). We have adhered to this construction in interpreting the scope of 11 U.S.C. §523(a)(4), refusing to deny discharge to those whose fiduciary duties were established by constructive, resulting and implied trusts. *Runnion v. Pedrazzini (In re Pedrazzini)*, 644 F.2d 756, 758 (9th Cir. 1981); *Schlecht v. Thornton (In re Thornton)*, 544 F.2d 1005, 1007 (9th Cir. 1976)." The core requirements are that the relationship exhibit characteristics of the traditional trust relationship, and that the fiduciary duties be created before the act of wrongdoing and not as a result of the act of wrongdoing." *Runnion*, 644 F.2d at 758. Fiduciary relationships imposed by statute may cause the debtor to be considered a fiduciary under §523(a)(4). *Quaif v. Johnson*, 4 F.3d 950, 953-54 (11th Cir. 1993); *Runnion*, 644 F.2d at 758 n. 2. In general, a statutory fiduciary is considered a fiduciary for the purposes of §523(a)(4) if the statute: (1) defines the trust res; (2) identifies the fiduciary's fund management duties; and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing. Cf. *Windsor v. Librandi*, 183 B.R. 379, 383 (M. D. Pa. 1995) (discussing whether a fiduciary under state securities act qualifies as a fiduciary under §523). See also *Runnion*, 644 F.2d at 759. . .

The court grants the Motion as to the Third Cause of Action, dismissing it without prejudice.

The court cannot find allegations of the fiduciary (whether contractual, statutory, or common law) relationship.

Though without prejudice, this does not kick off a never ending series of further amended complaints. While without prejudice, Plaintiff will have to file a motion for leave to file a further amended complaint, for which the court requires a copy of the proposed further amended complaint to be included as an exhibit to such motion.

Fourth Cause of Action—11 U.S.C. § 523(a)(6)

The Fourth Cause of Action alleges that based on the allegations in the Amended Complaint the obligation is nondischargeable because the injury was caused by the willful and malicious conduct of Defendants. The basis of the present Motion to Dismiss is that there are mere “threadbare and conclusory” allegations. That is incorrect, the allegations of the conduct are specific and concrete (that does not mean that they are provable and if so, whether they constitute willful and malicious conduct, but that is not before the court this day).

The Motion is denied as to the Fourth Cause of Action.

Fifth Cause of Action—11 U.S.C. § 727(a)(2)(A) [Clerical Error Identifying it as § 727(b)(2)(B)]

The Fifth Cause of Action asserts that the transfers made to Outsource on the eve of bankruptcy were with the “intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, . . . within one year before the date of filing their Chapter 7 case.” *Id.* ¶ 79.

Plaintiff alleges specific transfers, being done on the eve of bankruptcy, which appear to be made in contemplation of the bankruptcy case being filed. As addressed in the Sixth and Seventh Causes of Action, the Bankruptcy Code provides for the recovery of such preferences and fraudulent conveyance for the benefit of the bankruptcy estate. 11 U.S.C. § 544, 547, 548, 551.

In the Motion to Dismiss, Defendants quote 11 U.S.C. § 727(b), which is the provision referenced in the title to the Sixth Cause of Action. That section is clearly inapplicable to the allegations in the Fifth Cause of Action.

However, reading the Fifth Cause of Action is clear to any experienced bankruptcy attorney (such as Defendants’ attorney) that the reference is to 11 U.S.C. § 727(a)(2)(A) [emphasis added]:

11 U.S.C. § 727

(a) The **court shall grant the debtor a discharge, unless—**

(1) the debtor is not an individual;

(2) the **debtor, with intent to hinder, delay, or defraud a creditor or**

an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

The court is confident that Defendants understand and that their counsel can respond to the allegations for objecting to Defendants' discharge as provided under 11 U.S.C. § 727(a)(2). The only basis in the Motion to Dismiss is that the clerical error in referencing 11 U.S.C. § 727 renders that claim insufficient.

The Motion to Dismiss the Fifth Cause of Action is denied.

Sixth and Seventh Causes of Action

Plaintiff, asserting a claim against Defendants, seeks to avoid transfers made by Defendants to Outsource as permitted by 11 U.S.C. § 544 and § 547. As stated by Defendants in the Motion to Dismiss, those provisions give the power to avoid such transfers to the bankruptcy trustee, or the debtor in possession in Chapter 11 and Chapter 12 cases, and the **debtor in Chapter 13 cases**. In cases when a trustee, debtor in possession, or Chapter 13 debtor fail to exercise such powers and a creditor can show the court that it appears such powers should be exercised, the court can authorize the creditor to exercise such powers and rights for the benefit of the bankruptcy estate. *See* 11 U.S.C. § 551.

Here, there are no allegations that the court has so authorized Plaintiff to exercise the powers of the trustee or that in Defendant's bankruptcy case, Defendants as Chapter 13 Debtors (11 U.S.C. § 1303, *Houston v. Eiler (In re Cohen)*, 305 B.R. 886 (B.A.P. 9th Cir. 2004)) have that power, and being the fiduciaries of assets of the estate have the obligation to pursue recovery for the benefit of the estate avoidable transfers.

This case having been filed in November 2017, the two-year statute of limitations under 11 U.S.C. § 546 has not expired. How Defendants include the exercise of this power and recovery of the property transferred for the benefit of the estate will weigh on whether Defendants can fulfill their obligations and prosecute the case in good faith, or whether it will have to be reconverted to one under Chapter 7.

The court grants the Motion to Dismiss for the Sixth and Seventh Causes of Action without prejudice.

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 Grevorg Poladyan and Armine Asatryan (“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 denied as to the Second, Fourth, and Fifth Causes of Action.

IT IS FURTHER ORDER that the Motion is granted, and the First Cause of Action is dismissed without leave to amend.

IT IS FURTHER ORDERED that the Motion is granted, and the Third, Sixth, and Seventh Causes of Action are dismissed without prejudice. Plaintiff may seek leave to amend by noticed motion filed with the court, for which a copy of the proposed further amended complaint is filed as an exhibit in support of such motion.

The dismissal of the Sixth and Seventh Causes of action, in addition to seeking a future amendment, is without prejudice to Plaintiff filing a separate complaint after obtaining leave from the court, those causes of action not being of the same nucleus of facts upon which the nondischargeable claims being based and such claims, if permitted, being brought as a representative of the bankruptcy estate and not as an individual creditor seeking the 11 U.S.C. § 727(a)(2)(A) relief in this Complaint.

IT IS FURTHER ORDERED that Defendants Armine Asatryan and Grevorg Poladyan, and each of them, shall file an answer to the Amended Complaint for the Second, Fourth, and Fifth Causes of Action on or before **November 29, 2018**.

11. [17-27397-E-13](#) **GEVORG/ARMINE POLADYAN** **CONTINUED STATUS CONFERENCE**
[18-2014](#) **TRIVEDI V. POLADYAN ET AL** **RE: AMENDED COMPLAINT**
5-10-18 [31]

Plaintiff’s Atty: Peter G. Macaluso
Defendant’s Atty: Peter L. Cianchetta

Adv. Filed: 2/14/18
Answer: none
Amd. Cmplt. Filed: 5/10/18
Answer: none

Nature of Action:

Dischargeability - false pretenses, false representation, actual fraud

Dischargeability - fraud as fiduciary, embezzlement, larceny

Dischargeability - willful and malicious injury

The Status Conference is continued to 1:30 p.m. on December 11, 2018 (specially date and time). The Parties shall file and serve their updated Status Conference Reports on or before noon on December 10, 2018.

Notes:

Continued from 7/11/18. The Parties are negotiating a settlement through a Plan and requested the hearing be continued.

Plaintiff's Status Statement filed 11/7/18 [Dckt 55]

NOVEMBER 14, 2018, 2018 STATUS CONFERENCE

As the court has reviewed in connection with the Motion to Dismiss, the Defendant-Debtor has not yet confirmed a Chapter 13 Plan. Some of the issues related to the accuracy and completeness of the financial information provided by Debtor under penalty of perjury. While the proposed Plan provided for paying an 100% dividend on Plaintiff's unsecured claim, no plan has been confirmed.

At this juncture Plaintiff is advocating for the active prosecution of this Adversary Proceeding. The court has ruled on a Motion to Dismiss, sustaining the Motion for the First, Third, Sixth, and Seventh Causes of Action. The court has ordered Defendant-Debtor to file

The court concludes the Status Conference and vacates the order staying this Adversary Proceeding. The court shall issue its Pre-Trial Conference Scheduling Order as set forth below.

REVIEW OF COMPLAINT

On May 10, 2018, Tapan Trivedi, as the Administrator for the Estate of Ortansa Ambrus-Cernat, filed the Amended Complaint. Dckt. 31.

REVIEW OF COMPLAINT

The Amended Complaint filed by Tapan Trivedi, as the Administrator for the Estate of Ortansa Ambrus-Cernat, the Plaintiff, asserts that the obligation owed by Debtor to Plaintiff is nondischargeable based on fraud, breach of fiduciary duty, and injury caused by willful and malicious conduct. The court summarizes the allegations in the Complaint as follows:

- A. In Superior Court for Sacramento County Case No. 34-2015-00188010, Amended Complaint ¶ 1, Dckt. 31.
- B. Defendant-Debtor Gevorg Poladyan filed an answer to the Complaint. *Id.* ¶ 3.
- C. On August 8, 2008, Ortansa purchased the Palmwood Property at a shortsale from Defendant-Debtors for \$180,000. *Id.*, ¶ 14. To finance the \$180,000 purchase, it is alleged that Defendant-Debtors agreed that Ortansa would refinance her home to fund the short sale purchase. *Id.*, ¶ 24.
- D. It is further alleged that “Defendants convinced Ortansa to borrow money on her home, purchase the Palmwood Property at foreclosure, transfer the Palmwood Property back to Defendants, and then refinance the home a [*sic*] repay the \$180,000.00 to Ortansa to save Defendants’ home.” *Id.*, ¶ 26.
- E. Defendant-Debtors (collectively) purchased the “Palmwood Property” from Ortansa for \$180,000 on April 30, 2011. *Id.*, ¶ 15.
- F. Defendant-Debtor promised—
 - 1. They would care for Ortansa’s mentally challenged son;
 - 2. They would refinance the Palmwood Property and “re-pay” Ortansa. *Id.* ¶¶ 16–18.
- G. On February 2, 2012, Ortansa executed the grant deed to transfer the Palmwood Property to Defendant-Debtors. *Id.*, ¶ 19.
- H. Defendant-Debtors signed a loan agreement for \$100,000 with Outsourced Legal Support, LLC (“Outsourced”) on October 1, 2012, and a second loan agreement for \$80,000 with Outsourced on April 1, 2013. *Id.*, ¶¶ 20, 21. Defendant-Debtors encumbered the Palmwood Property with an additional \$50,000 obligation. *Id.*, ¶ 29.
- I. Defendant-Debtors did not, and it is alleged did not intend, to pay Ortansa the \$180,000 purchase price. *Id.*, ¶ 28.
- J. Ortansa died on May 20, 2014. *Id.*, ¶ 30.
- K. On November 5, 2017, Outsource recorded the two deeds of trust for the \$100,000 2012 loan and the \$80,000 2013 loan. *Id.*, ¶ 36. Defendant-Debtors commenced their bankruptcy case on November 8, 2017 (three

days later). *Id.* ¶ 34.

- L. In the First Cause of Action, Plaintiff merely requests that the court issue Declaratory Relief that the obligations of Defendant-Debtors would be nondischargeable if such litigation were to be commenced sometime in the future. *Id.* ¶¶ 36-37.
- M. In the Second Cause of Action, Plaintiff asserts that Defendant-Debtors' obligation to pay the \$180,000 is nondischargeable because the statement that Defendant-Debtors would repay the loan was false when made, Defendant-Debtors having no such intention at that time. The Second Cause of Action includes additional allegations of:
1. "Ortansa refinanced the Oak Property, for approximately \$180,000, which was used to purchase the Palmwood Property." *Id.* ¶ 47.
 2. "Defendants referred to Ortansa as 'mama' and spent many hours with her." *Id.* ¶ 48.
 3. "Defendants wrote and signed communication promising that they 'will pay the loan as soon as possible.'" *Id.* ¶ 51.
 4. "Defendants had an 'Agreement to Transfer Funds' prepared on April 14, 2014, which defendant, Armina Astryan signed stating 'the proceeds from the refinanced loan on 2242 Palmwood Ct., Rancho Cordova, CA will be assigned during escrow process to payoff the loan on the property 6005 Oak Ave, Carmichael, CA.'" *Id.* ¶ 52.
 5. "55. Defendants made a materially false promise as no payments were ever made." *Id.* ¶ 55. "Defendants refinanced the Palmwood property but did not repay the loan." *Id.* ¶ 56.
 6. "Defendants did not disclose the two notes with Outsource totaling \$180,000, to Pinnacle, nor in the loan application." *Id.* ¶ 60.
 7. Defendants refinanced the Palmwood property and purchased In-N-Out Honda, an auto wrecking yard. *Id.* ¶ 61.

8. “Plaintiff reasonably relied on the repayment to Ortansa as the Palmwood property was not encumbered at the time Ortansa’s loan was made. *Id.* ¶ 62.
9. “On August 22, 2018, Defendants conveyed two (2) Deeds of Trust, and a UCC-1 to Outsource.” *Id.* ¶ 63.

M. In the Third Cause of Action, Plaintiff asserts that, in light of the terms of the sale to Defendant-Debtors including promises for the case of Ortansa’s handicapped son, the obligation to pay the \$180,000 is nondischargeable “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” pursuant to 11 U.S.C. § 523(a)(4). Additional allegations in for the Third Cause of Action include:

1. “Plaintiff holds claims arising from for fraud or defalcation while acting in a ‘fiduciary capacity.’” *Id.* ¶ 67.
2. “Defendants had a close relationship with Ortansa.” *Id.* ¶ 68.
3. “Defendants made promises to care for Ortansa’s handicapped son after she died.” *Id.* ¶ 69.
4. “Defendants spent many hours with Ortansa and took her to church on a regular basis.” *Id.* ¶ 70.

N. In the Fourth Cause of Action, Plaintiff alleges that Defendant-Debtors are obligated to Ortana in the amount of \$210,000 “by failing to make any payments, failing to care for Ortana’s son resulting in his death, encumbering the property, causing willful and malicious injury to Ortana’s estate” pursuant to 11 U.S.C. § 523(a)(6). Additional allegations relating to the alleged willful and malicious conduct include:

1. “Defendants’ caused willful and malicious injury to Ortansa by failing to repay the money loaned.” *Id.* ¶ 76.

O. In the Fifth Cause of Action, Plaintiff alleges that Defendant-Debtors transferred property of the bankruptcy estate with the intend to hinder, delay, or default a creditor or officer of the estate within one year of the bankruptcy case and they should be denied a discharge pursuant to 11 U.S.C. § 727(b)(2)(A). Additional allegations relating to the alleged objection to discharge include:

1. “Defendants, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred property of the debtor within one year before the date of filing their Chapter 7 case.” *Id.* ¶ 79.

In Paragraph 6 of the Amended Complaint, Plaintiff alleges that there were transfers made to Outsource Legal Support, LLC within thirty days of the bankruptcy case being filed by Defendants. Paragraph 7 of the Amended Complaint identifies a second deed of trust to secure a \$100,000 obligation, a third deed of trust to secure an \$80,000 obligation, and a UCC-1 financing statement (securing an unidentified obligation) filed against Defendants’ business and assets.

It is further alleged in Paragraph 20 of the Amended Complaint that the loan agreement for the \$100,000 obligation was signed October 1, 2012 (citing to Exhibit 4, Dckt. 6), and in Paragraph 21, the loan agreement for the \$80,000 obligation was signed April 1, 2013 (citing Exhibit 5. Dckt. 6).

In Paragraph 34, it is alleged that the two deeds of trust were recorded and that the UCC-1 statement was filed on November 5, 2017. (Defendants’ bankruptcy case was filed on November 8, 2017.)

- P. In the Sixth Cause of Action, Plaintiff asserts that the 2017 transfer to Outsource was made within ninety days of the commencement of the bankruptcy case and may be avoided pursuant to 11 U.S.C. § 544.
- Q. In the Seventh Cause of Action, Plaintiff asserts that the transfers to Outsource are avoidable as preferences pursuant to 11 U.S.C. § 547.

The Court shall enter an order in substantially the following form:

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

The Continued Status conference having been conducted by the court, the matter not having been resolved by stipulation or a confirmed Chapter 13 Plan, and good cause appearing;

IT IS ORDERED that the Status Conference is continued to 1:30 p.m. on December 11, 2018. (Specially set date and time.) The parties shall each file their updated Status Conference Reports, which the court shall use in issuing the Pre-Trial Conference and Scheduling Order in this Adversary Proceeding.

The Court shall enter an order in substantially the following form vacating the order staying this Adversary Proceeding:

DCN: PLC-2

**ORDER VACATING STAY
OF ADVERSARY PROCEEDING**

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

The court having ordered the Parties to file updated Status Conference Reports and determining that the prosecuting of this Adversary Proceeding should proceed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order staying this Adversary Proceeding filed on August 1, 2018, (Dckt. 53) is vacated in its entirety and there is no stay of this Adversary Proceeding in effect in this Adversary Proceeding.

1.