UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 9, 2014 at 10:00 a.m.

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1. 14-26702-A-13 TERRY/ELLEN AMOS — ORDER RE: REQUEST FOR PRELIMINARY INJUNCTION
14-2326 — 11-24-14 [8]
AMOS V. HSBC MORTGAGE SERVICES, INC. ET AL

Tentative Ruling: The request for preliminary injunction will be denied.

The court's November 24, 2014 order denying the plaintiffs' request for a temporary restraining order set this hearing to determine whether it should grant a preliminary injunction. Docket 8.

The plaintiffs, Terry and Ellen Amos, the debtors in the underlying chapter 13 bankruptcy case, are asking the court to stop the foreclosure on their home.

The court is compelled to deny a preliminary injunction because in its November 24 order the court instructed the plaintiffs to serve by mail "this order and the summons and complaint on the defendants as well as attorney Malcolm Cisneros, A Law Corporation, no later than November 26, 2014." Docket 8 at 2.

Although the plaintiffs filed with the court a certificate of service on November 25, 2014, that certificate of service does not state that the court's November 24 order was served. Docket 9.

Moreover, there is nothing in the certificate of service indicating the identity of the parties served, the addresses at which they were served, and to whose attention each notice was addressed. Docket 9. The court cannot confirm that the defendant parties were properly notified, or notified at all, of the instant December 9, 2014 hearing. Accordingly, the court will deny the plaintiffs' request for preliminary injunction.

Further, even if the plaintiffs had complied with the November 24, 2014 order, the court cannot grant their request for preliminary injunction because the remedy at law is adequate.

Preliminary injunctions are extraordinary remedies never awarded as of right. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). In assessing whether the plaintiff is likely to suffer irreparable harm, the court is required to balance the interests of all parties and weigh the damage to each, including determining whether the party seeking the injunction has an adequate remedy at law. N. California Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1307 (1984); see also Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138, 1138 n.16 (9th Cir. 2009) (discussing whether constitutional violations can be adequately remedied through money damages).

Here, the plaintiffs have an adequate remedy at law because the statutory

injunction of 11 U.S.C. § 362(a) is still in place in the plaintiffs' underlying chapter 13 case. Thus, the court will deny the plaintiffs' request for a preliminary injunction.

In other words, the court does not have to resort to determining whether a preliminary injunction is warranted here because Congress has already made that determination by enacting a law that provides for an automatic injunction that protects persons - like the plaintiffs - who file for bankruptcy. See 11 U.S.C. § 362(a). The plaintiffs' bankruptcy case is still active and the injunction of 11 U.S.C. § 362(a) is still in place, protecting the plaintiffs from foreclosure.

Hence, to the extent the plaintiffs are requesting a preliminary injunction to stop the pending foreclosure of their home, that request will be denied.

2.	14-24810-A-7	BLANE/JENETTE PARROTT	MOTION TO
	14-2155	DBJ-2	DISMISS CAUSE OF ACTION
	BRUNE V. PARROTT ET AL		10-13-14 [30]

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants, Blane and Jenette Parrott, the debtors in the underlying chapter 7 case, seek dismissal of the second cause of action in the second amended complaint filed on September 29, 2014. Docket 25; see also Dockets 1 & 10. The defendants complain that the second amended complaint offers no facts to support the a claim under 11 U.S.C. § 523(a)(6).

Under the federal pleading rules, a complaint needs to give fair notice of the pleader's claim(s) so that the respondent parties can respond, undertake discovery, and prepare for trial. See Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Swierkiewicz.v. Sorema N.A., 534 U.S. 506, 513-14 (2002). Rule 8(a)(2), as incorporated by Fed. R. Bankr. P. 7008, calls for this notice to be contained in a short and plain statement of the claim showing that the pleader is entitled to relief.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint

pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

This dispute arises out of the plaintiff's work as a sub-contractor on real property owned by the defendants. The plaintiff apparently agreed to complete a construction project for the defendants for $106,260. The defendants obtained a loan to finance the construction. $294,398.53 was received and placed into a joint checking account with the plaintiff. The defendants transferred $250,098 from the joint account into their personal account.

In May 2008, the construction project passed interim inspections by the City of Paradise Building Department and passed a final inspection in December 2008. The plaintiff received $69,300 on account of his work; $44,300 came from the

joint account and $25,000 from the defendants' personal business account. This left a balance of $36,960 owed on account of the plaintiff's work.

Sometime subsequently, the defendants once again hired the plaintiff to do construction work on older portion of the same property at $40 an hour, plus reimbursement for materials. The plaintiff worked 1,250 hours, amounting to $50,000 in labor fees, and advanced $14,000 for materials.

An affidavit of completion was executed by the defendants and recorded with the Butte County Recorder's Office.

Together with the $36,960 in outstanding fees owed from the initial construction project, the defendants now owed the plaintiff a total of $100,960 ($36,960 + $50,000 + $14,000). The defendants did not pay these amounts to the plaintiff.

The defendants filed the underlying chapter 7 bankruptcy case on May 7, 2014. They received their discharge on August 8, 2014. This adversary proceeding was instituted by the plaintiff on June 4, 2014. The second amended complaint, filed on September 29, 2014, contains claims pursuant to 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6).

The plaintiff's mention of 11 U.S.C. § 727 under the heading of the second cause of action does not state a claim upon which relief can be granted. The second amended complaint merely recites a portion of 11 U.S.C. § 727, namely, 11 U.S.C. § 727(a)(1)-(4)(C).

Yet, the complaint does not say what subsection of 11 U.S.C. § 727 is being invoked. And, the court will not speculate about which facts the plaintiff believes are relevant to a 11 U.S.C. § 727 claim.

The court is not persuaded that a 11 U.S.C. § 727 claim has been stated upon which relief can be granted. As this is the plaintiff's second amended complaint and the court is hearing a second motion to dismiss by the defendants, the court will dismiss any 11 U.S.C. § 727 claims without leave to amend.

Further, turning to the merits of the 11 U.S.C. § 523(a)(6) claim, that subsection provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity." To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61; Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id. Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The

debtor must have had the subjective intent to harm or the subjective belief/knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6). A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The motion - barely two pages in length - does not brief the law on 11 U.S.C. § 523(a)(6) claims and makes no effort to analyze the claim, beyond making the following conclusory statements:

- "[t]here are simply no facts asserted as to state a cause of action stated in the alleged 'Second Cause of Action' of the complaint" and

- there are "no allegations as what conduct of debtors should be considered 'wilful and malicious.'"

Docket 32 at 2-3.

As to the initial construction project on which the plaintiff worked, he complains that the defendants emptied their joint bank account with the plaintiff, of funds that were intended to be used for the payment of the plaintiff for his construction services. The joint account was established for the receipt of construction loan funds and for the payment of contractors hired to work on the construction project. The plaintiff complains of the defendants withdrawing and/or transferring funds from the joint account to personal account(s) and appropriating the funds to uses other than for what the funds were intended, *i.e.*, payment for his construction services.

Thus, the alleged misconduct is the defendants' withdrawal and/or transfer of funds to personal account(s), for personal use, which funds were intended to be used for the payment of the plaintiff. The intended use of the funds is reinforced by the fact that they were received from the bank financing the construction into a bank account jointly held by the defendants and the plaintiff.

From the receipt of the funds into a joint account partially held by the plaintiff, the court also draws an inference that the funds were earmarked for the payment of the plaintiff for his construction services.

The defendants' withdrawals and/or transfers of funds was obviously done intentionally. Withdrawals from and transfers of funds between bank accounts are actions that do not occur unless done intentionally, *i.e.*, the party who initiated the transfer intended the transfer to take place.

The fund withdrawals and/or transfers deprived the plaintiff from the source of payment for his construction services, eventually resulting in the partial nonpayment for his services.

The complaint contains no facts from which the court could infer that the

withdrawals and/or transfers from the joint to the personal accounts was done with just cause or excuse.

The foregoing factual assertions satisfy the malicious aspect of the injury under 11 U.S.C. § 523(a)(6).

Turning to the willful aspect of the injury, the standard is subjective intent to harm or subjective belief or knowledge that harm is substantially certain to result from the misconduct.

As the defendants withdrew and/or transferred funds to their personal account(s) - while knowing that the funds were intended to be used for payment of the plaintiff's services, the court infers that the defendants had the subjective belief or knowledge that at least a partial nonpayment for the plaintiff's services is substantially certain to result from their transfers. This is a reasonable inference from the facts as alleged in the complaint, given that the defendants withdrew and/or transferred to personal account(s) $250,098 of the $294,398 received in the joint account, and the plaintiff received only $44,300 from those funds, on account of his $106,260 in construction services.

The defendants' withdrawals and/or transfers of funds from the joint account resulted in harm to the plaintiff's interest in his construction agreement with the defendants. He received less than what he had been promised.

The court is persuaded that the complaint states a claim for relief under 11 U.S.C. § 523(a)(6) upon which relief can be granted. Once again, the motion has been unhelpful in providing a reason for why the second amended complaint does not state a claim upon which relief can be granted. The motion will be granted in part and denied in part.

3. 13-30311-A-7 KATHERINE GERRARD — ORDER TO SHOW CAUSE
14-2094
GERRARD V. WF HOMEOWNER'S ASSOCIATION INC. ET AL — 11-6-14 [12]

Tentative Ruling: The complaint will be dismissed in its entirety.

This order to show cause was issued because of a failure by the plaintiff to prosecute this adversary proceeding.

Fed. R. Civ. P. 4(m), made applicable by Fed. R. Bankr. P. 7004(a)(1), requires the service of a complaint within 120 days of its filing. Rule 4(m) provides that "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time."

The instant complaint was filed on April 3, 2014. Docket 1. A summons was issued on April 3, 2014 as well. Docket 3. No other summonses were issued by the court. Fed. R. Bankr. P. 7004(e) provides that "[i]f service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued," meaning that the latest the April 3 summons could have been served was April 17.

The docket contains no proof of service indicating that the summons and complaint were served on or before the April 17 date. The docket contains no

proof of service indicating that the summons and complaint were served any time after April 17 either.

More, by the December 9 hearing on this order to show cause, 250 days will have elapsed since the filing of the complaint. The 120th and last day to serve a summons and the complaint was on August 1, 2014.

As no other summonses were issued by the court, after the April 3 summons, and the plaintiff is beyond the 120th day deadline under Rule 4(m) for filing the complaint, the court will dismiss the adversary proceeding complaint in its entirety.

Finally, the court notes that this is the second order to show cause issued by the court due to the plaintiff's failure to prosecute the case. The first one was issued on June 19, 2014. Docket 7. At a hearing on July 23, 2014, based on representation from the plaintiff, the court discharged that order to show cause. Docket 9. Another approximately six months have passed since the last order to show cause, and the plaintiff still has not served the complaint. This is further and independent basis for dismissing the complaint.

4. 13-30311-A-7 KATHERINE GERRARD — MOTION TO DISMISS
14-2094 JDH-1 — 11-7-14 [13]
GERRARD V. WF HOMEOWNER'S ASSOCIATION INC., ET AL.

Tentative Ruling: The motion will be denied as moot.

One of the defendants, WF Homeowners Association, Inc., moves for dismissal for insufficient service of process, under Fed. R. Civ. P. 12(b)(5) and 41(b), made applicable here by Fed. R. Bankr. P. 7012(b) and 7041. The other named defendant in this action, Allied Trustee Services, has filed a joinder to the movant's motion.

Given the court's ruling on its order to show cause, this adversary proceeding will be dismissed in its entirety, in accordance with that ruling. This motion will be denied as moot.

5. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO CLOSE CASE
DRE-20 — 10-13-14 [244]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are asking the court to close the case and enter a final decree, alleging in the motion that their plan was confirmed, that they continue to make payments under the confirmed plan, that they have filed all post-confirmation quarterly reports, and that there are no pending motions or adversary proceedings.

11 U.S.C. § 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Similarly, Fed. R. Bankr. P. 3022 provides that "[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

In the chapter 11 context, courts have defined full administration as

substantial consummation. In re Wade, 991 F.2d 402, 406 n.2 (7th Cir. 1993) (citing In re BankEast Corp., 132 B.R. 665, 668 n.3 (Bankr. D.N.H. 1991)). Substantial consummation is defined by section 1101(2) as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."

This court confirmed the debtor's chapter 11 plan on March 25, 2014. The confirmation order is final. Property has revested in the debtors pursuant to the terms of the plan. Docket 172 at 15.

However, the motion will be denied without prejudice because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions. There is no declaration in support of the motion, establishing the motion's factual assertions. See Local Bankruptcy Rule 9014-1(d)(6).

6. 13-34541-A-11 CAH-20 — 6056 SYCAMORE TERRACE L.L.C. VS. MOUNTAIN COUNTIES PLUMBING, INC. — MOTION TO VALUE COLLATERAL 11-14-14 [257]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent creditor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor moves for an order valuing its sole real property in Pleasanton, California, in an effort to strip off a $26,000 judicial lien held by Mountain Counties Plumbing, Inc. on the property and treat it as a wholly unsecured claim.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is secured only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in

conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

The debtor contends that the property has a value of $1,920,000, based on an apprisal report prepared by Antonio Mercado and the declaration of Mr. Mercado. Dockets 260 ¶¶ 5, 7 & 261.

The property is encumbered by at least five encumbrances:

- a first mortgage with a balance of approximately $2,250,700 held by JPMorgan Chase Bank (stripped down to $1,920,000 by stipulation - Dockets 111, 112, 160; see also Docket 223),

- a second mortgage with a balance of approximately $250,000 held by Indymac Bank, incurred in October 2007 (stripped off - Dockets 133 & 148; see also Docket 223),

- a third mortgage with a balance of approximately $200,000 held by Jahan and Faran Honardoost, incurred in December 2008 (stripped off - Dockets 134 & 149; see also Docket 223),

- a fourth mortgage with an unknown balance held by Valley Community Bank, incurred in December 2009 (See Docket 223),

- a judicial lien in favor of the respondent creditor, Mountain Counties Plumbing, for the outstanding amount of $26,000 (Abstract of Judgment recorded on April 2, 2012; see Docket 261, Ex. B at 4).

The subject property is a rental and is not the debtor's residence. The anti-modification provision of 11 U.S.C. § 1123(b)(5) then does not apply. Mountain Counties Plumbing's judicial lien against the property is wholly unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after the deduction of JPMorgan Chase Bank's first mortgage and all other liens senior to MCP. Hence, MCP's judicial lien will be stripped off, making it an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

7.	13-34541-A-11 14-2238	6056 SYCAMORE TERRACE L.L.C. CAH-19	MOTION TO APPROVE COMPROMISE
	6056 SYCAMORE TERRACE, L.L.C. V. MEISSNER, ET AL.		11-14-14 [26]

Final Ruling: The movant has provided only 25 days' notice of the hearing on this motion. Nevertheless, the notice of hearing for the motion requires written opposition at least 14 days before the hearing, in accordance with

Local Bankruptcy Rule 9014-1(f)(1). Motions noticed on less than 28 days' notice of the hearing are deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing. Accordingly, the motion will be dismissed.

8. 14-20348-A-11 JOE/CAROL MOBLEY — ORDER TO SHOW CAUSE 11-12-14 [112]

Tentative Ruling: The motion to prohibit use of cash collateral, compel turnover of cash collateral, etc. will be dismissed without prejudice.

This order to show cause was issued because when Creditor OneWest Bank filed its motion to prohibit use of cash collateral, compel turnover of cash collateral, etc. on October 28, 2014, it did not pay some or all of the filing fee. The fee is outstanding in the amount of $15.00. This is cause for dismissal of the motion.

9. 14-20348-A-11 JOE/CAROL MOBLEY
PPR-2 — MOTION TO PROHIBIT USE AND COMPEL TURNOVER OF CASH COLLATERAL, FOR ADEQUATE PROTECTION, DISMISSAL OR CONVERSION OF CASE TO CHAPTER 7 10-28-14 [104]

Tentative Ruling: The motion will be dismissed without prejudice.

Creditor OneWest Bank, holding the first mortgage on the debtors' four unit residential real property in Richmond, California, for approximately $752,236, asks the court:

- to prohibit the debtors' use of the movant's cash collateral,

- to compel turnover of the movant's cash collateral,

- to compel the debtors to provide the movant with accounting of their use of the cash collateral,

- for adequate protection payments, including "at a minimum, immediate turnover of all post-petition payments collected, immediate payment of the real property insurance, segregation of the cash collateral going forward" (Docket 104 at 7),

- in the alternative, for dismissal or conversion of the case to chapter 7.

The court issued an order to show cause because when Creditor OneWest Bank filed the instant motion on October 28, 2014, it did not pay some or all of the filing fee. The fee is outstanding in the amount of $15.00. This is cause for dismissal of the motion. Accordingly, this motion will be dismissed without prejudice.

Further, even if the motion were not to be dismissed, it would have been denied because the debtors surrendered the property to the movant on or about October

20, 2014. Docket 120 at 5.

On October 20, 2014, the court entered an order lifting the stay and allowing the movant to foreclosure on the property. Docket 100. Hence, the movant has elected its remedy by obtaining an order permitting it to conduct a nonjudicial foreclosure on the property.

10. 14-26460-A-7 VOLODYMYR SEMENYUK — STATUS CONFERENCE
14-2239 — 8-18-14 [1]
ALEXANDROV V. SEMENYUK

Tentative Ruling: None.

11. 14-26460-A-7 VOLODYMYR SEMENYUK — REQUEST FOR ENTRY OF DEFAULT JUDGMENT
14-2239 — 10-16-14 [11]
ALEXANDROV V. SEMENYUK

Tentative Ruling: None. As the court is denying the defendant's motion to set aside the entry of default, the court will consider entering a default judgment.

12. 14-26460-A-7 VOLODYMYR SEMENYUK — MOTION TO SET ASIDE
14-2239 MS-1 — 10-24-14 [16]
ALEXANDROV V. SEMENYUK

Tentative Ruling: The motion will be denied.

The defendant, Volodymyr Semenyuk, asks the court to vacate its default entered against him on December 2, 2014.

Fed. R. Civ. P. 55(c), made applicable here by Fed. R. Bankr. P. 7055, provides that the court may set aside an entry of default for good cause shown, and it may set aside a default judgment under Rule 60(b). "The 'good cause' standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b). (Citation omitted) The good cause analysis considers three factors:"

(1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant had a meritorious defense to the action, or (3) whether vacating the default judgment would prejudice the plaintiff.

"As these factors are disjunctive, the district court was free to deny the motion [for relief from the default] 'if any of the three factors was true.'"

Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004); TCI Group Life Ins. Plan v. Knoebbler, 244 F.3d 691, 696, overruled in part on other grounds by 532 U.S. 141, 147-50 (9th Cir. 2001); American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000); see also Kajander v. Phoenix, No. CV 09-02164-PHX-JAT, 2010 WL 653386 *1 (D. Ariz. Fed. 19, 2010).

The motion will be denied because it makes no showing of a meritorious defense. There are no specific facts in the motion that would constitute a defense.

"*A party in default thus is required to make some showing of a meritorious defense as a prerequisite to vacating an entry of default. Medunic v. Lederer, 533 F.2d 891, 893 (3d Cir.1976); Wright & Miller, supra, § 2697. Stone made no*

showing of a meritorious defense. We recognize that the standards for setting aside entry of default under Rule 55(c) are less rigorous than those for setting aside a default. Under these circumstances, however, it would have been an abuse of discretion to set aside the entry of default. Smith v. Block, 784 F.2d 993, 996 n.4 (9th Cir.1986) (citing Salmeron v. United States, 724 F.2d 1357, 1364 (9th Cir.1983) (appellate court may affirm on any ground supported by the record even though the ground relied on by the district court is different from the one outlined by the appellate court)). To permit reopening of the case in the absence of some showing of a meritorious defense would cause needless delay and expense to the parties and court system."

Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986) (emphasis added).

"*The district court reasoned that HRG 'had conceded the question of liability,' which went 'a long way to suggesting that at least as to liability the defendant has no meritorious defense.' HRG now contends that while it may have conceded liability, it nevertheless contested the extent of the deficiency owed. To justify vacating the default judgment, however, HRG had to present the district court with specific facts that would constitute a defense. See Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir.1969). HRG never did this. Instead, it offered the district court only conclusory statements that a dispute existed. A 'mere general denial without facts to support it' is not enough to justify vacating a default or default judgment. Id.*"

Franchise Holding II at 926.

The motion is devoid of facts - let alone specific facts - supporting the defendant's claim that he has a meritorious defense. The motion says only that:

"*The Defendant will be able to prove that no instances of any intentional misrepresentation took place, that the Plaintiff had a duty to know the facts that is alleged to be misrepresented, that the Plaintiff has absolutely not acted in reliance of the Defendant's representations, if any, and that the plaintiff has not suffered any damages whatsoever. In addition, viable defenses include estoppel and Plaintiff's unclean hands. The defendant is positive he will prevail on these defenses, and the outcome would be contrary to the results achieved by default. Therefore, the Defendant has set forth a meritorious defense and satisfies the second good cause factor.*"

Docket 18 at 7-8.

These are merely conclusory statements without a single fact tending to show that the defendant has a meritorious defense. Simply stating the elements of the plaintiff's cause of action and disputing them, without facts, is not sufficient to overturn the entry of a default.

While the defendant has cited Audio Toys, Inc. v. Smart AV Pty Ltd., Case No. C 06-6298 SBA, WL 1655793, at *3 (N.D. Cal., June 7, 2007), that case appears to be internally inconsistent. At first, Audio Toys quotes TCI Group Life Ins. Plan v. Knoebbler, 244 F.3d 691, 700, overruled in part on other grounds by 532 U.S. 141, 147-50 (9th Cir. 2001), that "'[a] defendant seeking to vacate a default judgment must present specific facts that would constitute a defense,'" but then Audio Toys goes on to say that "[t]he moving party need only assert a factual or legal basis that is sufficient to raise a particular defense."

Audio Toys at *3. These two statements are inconsistent. The "specific facts" requirement does not encompass a "legal basis." The Ninth Circuit cases cited above are explicit that specific facts are required.

Finally, even if the defendant had asserted facts in the motion to support his claim of a meritorious defense, the defendant's supporting declaration does not substantiate such facts. Before the court may admit and consider facts asserted in the motion, every fact must be admissible - it must be supported and established by a declaration. See Fed. R. Evid. 402, 602, 901(a), 901(b)(1). The defendant's declaration in support of the motion says nothing about facts that pertain to a defense. Docket 19. The defendant's declaration makes factual statements only about:

- the background facts relating to the bankruptcy filing
- the defendant's nonreceipt of and inability to understand documents served on him
- a strained relationship with his wife, and
- his delay in appearing in this adversary proceeding.

As neither the motion nor declaration contain factual statements pertaining to a defense - meritorious or otherwise - the court will not set aside the entry of default and will deny this motion.

13. 12-29961-A-7 PAUL DOSCHER — COUNTERCLAIM FOR ABUSE OF PROCESS
13-2378
WHATLEY V. MOREHOUSE ET AL — 10-30-14 [80]

Tentative Ruling: The motion will be granted insofar as it asks for dismissal of the complaint as to Wanda Eaton, but all other relief will be denied.

Wanda Eaton, a.k.a. Wanda Doscher, moves for:

- dismissal of the claims asserted against the defendants,
- prohibiting the plaintiff "from demanding turnover of property" from defendants Jack Morehouse, the movant, and the Paulsue Living Trust, and
- awarding attorney's fees, "at paralegal rate," in favor of the defendants.

Although the subject matter is titled as a counterclaim, the court will treat it as a motion, given that it is set for hearing on the court's law and motion calendar, and given that it basically seeks sanctions for the filing of the complaint.

Next, the court will order dismissal of the plaintiff's claims against all defendants, given that it is dismissing those claims pursuant to the plaintiff's motion to dismiss, also being heard by this court on this calendar.

In the alternative, to the extent the subject motion seeks dismissal pursuant to Fed. R. Civ. P. 12(b), it is too late for the movant to file such a motion to dismiss at this time. Fed. R. Civ. P. 12(b), as made applicable here by Fed. R. Bankr. P. 7012, provides that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. . . . [and] [a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." The movant's request for dismissal should have been filed prior to the movant's filing of her answer on January 2, 2014.

Further, the court will deny the relief the movant seeks with respect to the

other two defendants in this proceeding, Jack Morehouse and the Paulsue Living Trust. The movant does not have standing to seek relief for others.

The court will deny the request to prohibit the plaintiff "from demanding turnover of property" from Jack Morehouse and the trust. Also, the court will not award attorney's fees with respect to Jack Morehouse and the trust.

The movant does not represent Mr. Morehouse in any capacity. And, although the movant has represented in the past to be the trustee of the Paulsue Living Trust, the court entered an order on February 19, 2014 striking the trust's answer, which was filed by the movant, and ruling that the movant cannot represent the trust in this proceeding, as she is not a licensed attorney. Docket 22. Later, in connection with the movant's motion for reconsideration on behalf of the trust, the court noted once again that "by representing the trust, [the movant] Ms. Eaton is engaged in the unauthorized practice of law." Docket 51 at 2.

Another reason for not awarding any of the requested relief to the trust is that, at the April 14, 2014 hearing on the plaintiff's motion to strike, the movant represented to this court that the trust does not exist any longer and the movant, in her individual capacity, is the successor party in interest to the trust and the real party in interest in this litigation. Docket 51 at 2.

Furthermore, the court will not award attorney's fees to the movant. Pro se litigants are not entitled to attorney's fees, even when the pro se litigant is an attorney. See Elwood v. Drescher, 456 F.3d 943, 947-48 (9th Cir. 2006) (citing Kay v. Ehrler, 499 U.S. 432 (1991), which holds that pro se attorney litigants are not entitled to attorney's fees in the successful litigation of civil rights claims). Elwood has recognized that the rule in Kay has been applied to other areas, including 17 U.S.C. § 505, Rule 11, and 28 U.S.C. § 1927. Elwood at 947. As a result, Elwood has ruled "that Kay imposes a general rule that pro se litigants, attorneys or not, cannot recover statutory attorneys' fees." Id.

To the extent the movant is seeking attorney's fees as sanctions under Fed. R. Bankr. P. 9011, such request will be denied. The movant argues that the plaintiff "violate[s] the Federal Rule of Civil Procedure § 11 [*sic*] by knowingly asserting claims without plausible grounding in law and fact which has caused and continues to cause substantial costs and inflicted emotional distress to the opposing parties."

Fed. R. Bankr. P. 9011(c)(1)(A), the Federal Rules of Bankruptcy Procedure equivalent of Rule 11 in the Federal Rules of Civil Procedure, prescribes that:

"(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

"(1) *How Initiated.*

"(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court

may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b)."

The underlined portion of Rule 9011 is known as the safety harbor provision. The court cannot award any sanctions in this matter under Rule 9011 because the movant has not demonstrated that she has complied with Rule 9011(c)(1)(A).

The subject papers were filed with the court on October 30, 2014. Docket 80. The court cannot find any evidence in the record that the papers were served on the plaintiff at least 21 days prior to their submission with the court. The two proofs of service for this matter, Dockets 83 and 86, do not reflect the date when the papers were served on the plaintiff.

Additionally, the court will deny as moot the movant's request to prohibit the plaintiff "from demanding turnover of property" from her, given that the court is granting the plaintiff's motion to dismiss the claims against all defendants. Such request is moot in the context of this proceeding.

Finally, to the extent the movant is seeking by the subject pleading to have her answer amended to assert compulsory counterclaims, such request will be denied as untimely.

Fed. R. Bankr. P. 7013 provides that "Rule 13 F.R.Civ.P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim that the party has against the debtor, the debtor's property, or the estate, unless the claim arose after the entry of an order for relief. A trustee or debtor in possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action."

Fed. R. Civ. P. 13(a)(1), as made applicable here by Fed. R. Bankr. P. 7013, prescribes that:

"(1) *In General*. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

"(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction."

The counterclaims for relief asserted by the movant in the subject matter arose after the order for relief. The request for prohibition of the plaintiff "from demanding turnover of property" and the request for attorney's fees, pertain to events or occurrences - namely, the filing and prosecution of the instant adversary proceeding - that have transpired since the filing of the instant adversary proceeding on December 4, 2013. On the other hand, the underlying voluntary chapter 7 bankruptcy case was filed on May 24, 2012.

To the extent the counterclaims for relief asserted by the movant here are compulsory, they should have been pleaded in the answer the movant filed on January 2, 2014. Docket 9.

And, it is too late to amend the answer.

Fed. R. Civ. Proc. 15(a)(1), as incorporated by Bankruptcy Rule 7015, states that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave."

The movant has not requested leave of court to have her answer amended. Nor would an amendment be appropriate at this time, given that the parties have reached the end of litigation in this adversary proceeding.

14. 12-29961-A-7 PAUL DOSCHER — MOTION TO DISMISS ADVERSARY PROCEEDING
13-2378 PLC-6
WHATLEY V. MOREHOUSE ET AL — 11-24-14 [91]

Tentative Ruling: The motion will be granted and the adversary proceeding complaint will be dismissed.

The plaintiff, Douglas Whatley, the trustee in the underlying chapter 7 case, seeks dismissal of a collection cause of action, asserted against each of the three named defendants. Although the single claim for relief purports to be for "turnover", in fact it is a collection action on debt already reduced to judgment.

Fed. R. Civ. P. 41(a)(2), as made applicable here via Fed. R. Bankr. P. 7041, provides: "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."

According to the complaint, one of the defendants, Jack Morehouse, instituted pre-petition nonbankruptcy claims against Paul Doscher, the debtor in the underlying bankruptcy case, as well as against Wanda Eaton (a.k.a. Wanda Doscher) and the Paulsue Living Trust. The litigation was eventually dismissed and "an order for costs" was entered. "The Order requires defendant Jack Morehouse to pay to Paul Doscher individually and as Trustee of the Paulsue Living Trust Prejudgment Costs in the amount of $7,837.22." Docket 69 ¶ 9. This court concluded that the Paulsue Living Trust no longer exists. Docket 51 at 2.

In its ruling of October 14, 2014 on the plaintiff's motion for summary judgment, this court held that:

"*This is not a turnover complaint. It is a collection action. More to the point, it is an effort to collect a judgment already entered in a collection action. The problem for the plaintiff is that this court did not enter the judgment. As the successor in interest to the prevailing party in the state court, the trustee should use the state court procedures in the state court to collect a judgment. The court sees no utility in entering a judgment to enforce a judgment. The San Diego Superior Court entered an order directing Jack*

Morehouse to pay the funds to the debtor. As the debtor has now filed for bankruptcy, the plaintiff is the proper party in interest with standing to enforce the order. 11 U.S.C. § 541(a) specifies what constitutes property of the bankruptcy estate and 11 U.S.C. § 704(a) outlines the duties of the plaintiff in administering the bankruptcy estate, including that he "collect and reduce to money the property of the estate for which such trustee serves." 11 U.S.C. § 704(a)(1). The plaintiff may seek a writ of execution solely based on the order entered by the San Diego Superior Court. Accordingly, it is unnecessary for this court to adjudicate or enter another order or judgment about the same debt. The motion will be denied."

As there is no utility in entering another judgment, the court will dismiss the single cause of action as to each of the defendants, pursuant to Rule 41(a)(2). The motion will be granted.

15. 10-38671-A-7 PATRICK/DEBRA FERRIE — MOTION TO DISMISS
14-2228
FERRIE ET AL V. BANK OF AMERICA N.A. — 10-17-14 [27]

Tentative Ruling: The motion will be granted.

The defendant, Bank of America N.A., seeks dismissal of the claims in the first amended complaint brought by the plaintiffs, Patrick Ferrie and Debra Ferrie, the former debtors in concluded chapter 7 case. The plaintiffs seek:

[Claim One] declaratory relief as to the dischargeability of the plaintiffs' mortgage debt owed to the defendant and whether the defendant's report of the debt as discharged to a credit reporting agency violates the discharge injunction (Docket 19 ¶ 19):

[Claim Two] a determination that the defendant has violated the California Consumer Credit Reporting Agencies Act (Docket 19 at 4-5); and

[Claim Three] attorney's fees pursuant to the agreement between the plaintiffs and the defendant and in accordance with Cal. Civ. Code § 1717 (Docket 19 at 5).

In general, the plaintiffs complain that the defendant has refused to stop the reporting of their discharged mortgage debt to credit reporting agencies. Docket 19 ¶ 19.

Claim one does not state a claim upon which relief can be granted and the court does not have subject matter jurisdiction over claim two. Claim one does not state a claim for a violation of the discharge injunction and, even if it did, no private right of action exists and such claims cannot be asserted via an adversary proceeding complaint. As the underlying bankruptcy case has been fully administered, and no violation of the discharge injunction has been made out, this court has no subject matter jurisdiction over claim two. Claim three will be dismissed as well, given the dismissal of claims one and two without leave to amend.

The following facts are alleged. On July 15, 2010, the plaintiffs filed a chapter 7 bankruptcy case. Listed in Schedule A was the plaintiffs' home in Elk Grove, California. Docket 19 at 2; Case No. 10-38671, Docket 1, Schedule A. The defendant is listed in Schedule D as holding the only mortgage on that property. Case No. 10-38671, Docket 1, Schedule D.

The chapter 7 trustee filed a notice of assets on August 25, 2010 and the plaintiffs received their chapter 7 bankruptcy discharge on October 27, 2010. Docket 19, Ex. B; Case No. 10-38671, Dockets 11-12. The trustee filed his final report and account on July 19, 2011 and the case was closed on August 25, 2011. Case No. 10-38671, Dockets 27 & 30.

The debt was reported by the defendant to the credit reporting agencies in April 2012 and it appeared on a June 23, 2014 credit report received by the plaintiffs. Docket 19, Ex. C. The credit report indicated a balance of $0.00 with a status of "Closed/Included in Bankruptcy/Bankruptcy or Wager Earner Plan." Docket 19, Ex. C.

Fed. R. Civ. P. 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

First, claim one does not state a claim upon which relief can be granted for several reasons. Claim one is ambiguous about whether it is asserting a violation of the discharge injunction. Paragraph 19 of the first amended complaint states that the defendant "cannot report the credit of Plaintiff after the discharge as it would be a violation of the discharge injunction." Docket 19 at 3. On the other hand, paragraph 26 states that "[a]fter determination that the debt was properly discharged, debtor be allowed to file a contempt motion for violation for the discharge injunction." Docket 19 at 4. The plaintiffs' request to file a motion for violation of the discharge injunction, while seeking to prohibit the reporting by the defendant as it purportedly violates the discharge injunction are inconsistent and contradictory.

Second, assuming the complaint alleges a violation of the discharge injunction, there is no private right of action under the Bankruptcy Code for violations of the discharge injunction. Such a claim can be initiated only by a motion. It cannot be initiated by an adversary proceeding. 11 U.S.C. § 524; Walls v. Wells Fargo Bank, 276 F.3d 502, 508-09 (9th Cir. 2002); Cady v. SR Fin. Services (In re Cady), 385 B.R. 756, 757-58 (Bankr. S.D. Cal. 2008); Barrientos v. Wells Fargo Bank, 633 F.3d 1186, 1188-1189 (9th Cir. 2011).

Therefore, a debtor may seek damages for violation of the injunction only by invoking the court's contempt powers under 11 U.S.C. § 105. A party who knowingly violates the discharge injunction can be held in contempt under 11 U.S.C. § 105(a) by motion to the court. See Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) (citing Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)); Barrientos v. Wells Fargo Bank, 633 F.3d 1186, 1188 (9th Cir. 2011).

Thus, to the extent claim one is asserting a violation of the discharge injunction, it will be dismissed as improperly asserting such a claim in an adversary proceeding.

Third, claim one will be dismissed because the plaintiffs do not have standing to assert the claim.

To establish standing, a plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Lexmark Intern., Inc. v. Static Control Components, Inc.,

Case No. 12-873, WL 1168967, at *6 (Mar. 25, 2014); Allen v. Wright, 468 U.S. 737, 751 (1984), *rev'd on other grounds*, 2014 WL 1168967 (Mar. 25, 2014); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

There is no factual or legal dispute as to whether the debt owed to the defendant was discharged. The debt is a prebankruptcy debt secured by a mortgage. The court is unaware of any authority making such a debt nondischargeable. More importantly, the defendant does not dispute that the debt was discharged. Docket 27 at 2. Even the defendant's reporting of the debt acknowledges that the debt was "included in bankruptcy" case, that it is no longer owed, and the account is "closed". Docket 19, Ex. C. There is no injury in fact, *i.e.*, a dispute over whether the debt was discharged, and therefore the plaintiffs have no constitutional standing to assert this aspect of claim one.

Fourth, the plaintiffs do not have standing as to a second aspect of claim one – whether the defendant's reporting of the debt violates the discharge injunction.

Even assuming the plaintiffs can assert a claim for violation of the discharge injunction, the first amended complaint pleads no an actual or threatened injury arising from the defendant's reporting of the discharged debt. There are no facts in paragraphs 1 through 26 of the first amended complaint, which contain all facts pertaining to claim one, indicating that the plaintiffs suffered harm or are about to suffer harm due to the credit report or other actions prohibited by 11 U.S.C. § 524(a), the discharge injunction.

11 U.S.C. § 524(a) prescribes that:

"*(a) A discharge in a case under this title—*

"*(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;*

"*(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and*

"*(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523 (c) and 523 (d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.*"

For instance, the complaint says nothing about a commencement or continuation of an action to collect a debt from the plaintiffs. The complaint fails to

allege any actual or threatened harm arising from the report to the credit reporting agencies. How is it possible that telling a credit reporting agency that the plaintiffs owe nothing to the defendant because the debt was discharged in a bankruptcy is an act to collect a debt?

And, to the extent the plaintiffs are pleading that this report violated nonbankruptcy law, this does not mean the discharge injunction has been violated. Nothing in 11 U.S.C. § 524(a) states that the defendant's violation of nonbankruptcy law can amount to violation of the discharge injunction.

The court deals in further detail below with the plaintiffs' claims based on nonbankruptcy law. As explained more fully below, the court has no subject matter jurisdiction over such claims.

Fifth, the second aspect of claim one - whether the defendant's reporting of the debt violates the discharge injunction - also fails under Rule 12(b)(6) because the only alleged misconduct is the defendant's credit report and 11 U.S.C. § 524(a) makes no mention of "reporting" activities being prohibited by the discharge injunction.

The court is aware of no authority stating that the discharge injunction prohibits a report to a credit agency truthfully stating that a debt was included in a bankruptcy case and is no longer owed. The plaintiffs' opposition cites no such legal. Nothing that is alleged in the first amended complaint indicates that the defendant's reporting of the debt amounts to a prohibited activity under section 524(a).

It is no wonder that section 524 does not speak to credit reporting activities, given that there are several federal and state nonbankruptcy laws regulating the reporting of credit information. For example, Cal. Civ. Code § 1785.13(a)(1) provides: "(a) No consumer credit reporting agency shall make any consumer credit report containing any of the following items of information: (1) Bankruptcies that, from the date of the order for relief, antedate the report by more than 10 years."

In short, the reporting of credit information has been left to the nonbankruptcy law arena and this court is not about to change this.

Sixth, even if it were possible to violate the discharge injunction by making a credit report, the defendant's reporting is not inconsistent with the plaintiffs' chapter 7 bankruptcy discharge. As mentioned above, the reporting acknowledges that the debt was "included in bankruptcy" case and that it is no longer owed, reporting a $0.00 balance and status of account "closed". Docket 19, Ex. C. None of these statements are inconsistent with the plaintiffs' discharge.

The plaintiffs' complaint that the "Last Active" date of 03/2012 is inaccurate also makes no sense. Docket 19, Ex. C. The "Last Active" date could be referring to when the defendant reviewed the account or when the account was last in "open" status. Obviously, as the account is reported as "closed" as of April 2012, there is no harm to the plaintiffs from the reporting that the account was "Last Active" in "03/2012". The complaint makes no effort to plead facts that would make the reporting of the "Last Active" date amount to violation of the discharge injunction.

Seventh, as discussed above, none of the facts pleaded in the complaint rise to the level of a violation of the discharge injunction, as contemplated by 11

U.S.C. § 524.

Eighth, this court does not have subject matter jurisdiction over claim two as that claim is based on nonbankruptcy law.

A proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)).

Here, claim two is not core as it arises solely under nonbankruptcy law, namely, the California Consumer Credit Reporting Agencies Act.

The court does not have "related to" jurisdiction over claim two because the underlying bankruptcy case is no longer being administered. The case was filed on July 15, 2010. The chapter 7 trustee filed a notice of assets on August 25, 2010 and the plaintiffs received their chapter 7 bankruptcy discharge on October 27, 2010. Docket 19, Ex. B; Case No. 10-38671, Dockets 11-12. The trustee filed his final report and account on July 19, 2011 and the case was closed on August 25, 2011. Case No. 10-38671, Dockets 27 & 30.

As the outcome of claim two could not possibly have any impact on the administration of the underlying bankruptcy case, this court does not have "related to" jurisdiction over claim two.

To the extent available, the court declines to exercise jurisdiction under Carraher v. Morgan Elec., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992) either. A state court is much better equipped at resolving claim two, given that it is based on state law.

Finally, as claim three is based on the assumption that the plaintiffs would prevail on claims one and two and the court is dismissing it as well. The motion will be granted in accordance with this ruling.

16. 14-27083-A-11 RCK CONSERVATION CO-OP, L.L.C. — STATUS CONFERENCE 7-8-14 [1]

Tentative Ruling: None.

17. 09-23465-A-11 HLC-13 MOORE EPITAXIAL, INC. — MOTION TO CONVERT CASE O.S.T. 11-24-14 [224]

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The revested debtor moves for conversion to chapter 7 pursuant to 11 U.S.C. § 1112(b), conceding that the debtor can no longer perform under its confirmed chapter 11 plan. The debtor filed this case on February 27, 2009 and obtained confirmation of its second amended chapter 11 plan on January 7, 2010. The case was closed and final decree was entered on March 21, 2010.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, 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, if the movant establishes cause."

For purposes of this subsection, cause includes A material default by the debtor with respect to a confirmed plan. See 11 U.S.C. § 1112(b)(4)(N).

Under the terms of the plan, the debtor was required to raise sufficient funds by December 31, 2014 to complete the pre-production of its eZEN machine in China, to preserve its patent rights with respect to that technology, and operate its business to fund operating expenses while waiting for adequate funds to pay the claims allowed under the plan, whether through the sale or trade of its 30,850 common stock shares in International Reactor Service, Inc., or from net operation profits.

The debtor's eZEN machine was never certified as operational and the debtor was not able to sell its International Reactor stock by the plan deadline. The sale of the stock was conditioned on the initial public offering of the Simgui Stock on or before August 31, 2012. The IPO did not take place before the August 31, 2012 deadline, triggering, as result, forfeiture of 80% of the International Reactor stock to creditor GSI Creos under the terms of the plan.

While the debtor could have potentially paid by the December 31, 2014 deadline the Class 3 claimants under the plan with the remaining 20% of the International Reactor stock (8,947 shares), Simgui's IPO has not taken place yet. The IPO process has been shut down in China for the last two years and the debtor has no way of knowing where is Simgui in the IPO process.

Even though the December 31, 2014 deadline has not passed yet, there is only approximately three weeks left until that date. Also, the holiday season is at hand and business activity is significantly lower between Thanksgiving and New Year's than during the remainder of the year. The court also notes that even a last-minute IPO by Simgui would still result in the debtor defaulting under the plan because the debtor would still need to sell the International Reactor stock.

As the debtor has been unable to meet the plan conditions for raising the necessary funds to pay allowed claims and as it does not have sufficient income to continue operating, there is cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

The debtor has assets that could be liquidated for the benefit of the estate, including its 8,947 shares of International Reactor stock. Accordingly, conversion to chapter 7, rather than dismissal, would be in the best interest of the estate. The motion will be granted and the case will be converted to chapter 7.