UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 12, 2016 at 10:00 a.m.

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1. 10-49214-A-13 GREGORY/OLGA PETERSEN — MOTION TO DISMISS ADVERSARY
16-2205 AMH-1 — 10-31-16 [9]
PETERSEN ET AL V. BAC HOME LOAN SERVICING L.P. ET AL

Final Ruling: This motion will be dismissed as moot because the adversary proceeding was dismissed on November 23, 2016 as to all three defendants, pursuant to a stipulation among the parties. Docket 16 & 17.

2. 10-49214-A-13 GREGORY/OLGA PETERSEN — MOTION TO DISMISS ADVERSARY
16-2206 NLL-1 — 11-1-16 [6]
PETERSEN ET AL V. NATIONSTAR MTG., L.L.C.

Tentative Ruling: The motion will be granted in part.

The defendant, Nationstar Mortgage, L.L.C., seeks dismissal without leave to amend under Fed. R. Civ. P. 12(b)(6) of the nine causes of action asserted by the plaintiffs, Gregory and Olga Petersen, who are the debtors in the underlying discharged chapter 13 bankruptcy case. The defendants oppose the motion in part.

The claims in question include:

(1) claim for declaratory relief to determine the value and extent of the defendant's interest in the debtor's property,
(2) violation of 11 U.S.C. § 1328,
(3) violation of 11 U.S.C. § 524,
(4) breach of contract,
(5) willful violation of 15 U.S.C. § 1681w (Federal Credit Reporting Act),
(6) negligent violation of 15 U.S.C. § 1681w,
(7) negligent per se violations of the FCRA and the Gramm-Leach Bliley Act (15 U.S.C. § 1601),
(8) negligence, and
(9) attorney's fees and costs.

The plaintiffs filed the underlying chapter 13 case on November 4, 2010. They obtained confirmation of their chapter 13 plan on February 1, 2011. Case No. 10-49214, Docket 19. The plaintiffs' real property in Plumas Lake, California was subject to a mortgage held by Bank of America as of the petition and plan confirmation dates.

On or about December 5, 2012, Bank of America assigned its interest in the property to the defendant. In 2015, the defendant approved a loan modification for the plaintiffs' Plumas Lake property.

On March 31, 2016, the defendant filed a notice of mortgage payment change, increasing the plaintiffs' mortgage escrow payments for property taxes and insurance from $565.70 to $955.96. Case No. 10-49214, Docket 95. The court entered the plaintiffs' chapter 13 discharge on April 11, 2016.

The plaintiffs filed the instant adversary proceeding on September 29, 2016, asserting the above-outlined nine causes of action and contending that the defendant increased the required mortgage escrow payment on account of pre-petition property taxes owed by the plaintiffs as of the chapter 13 petition filing date, but which property taxes were paid in full through their chapter 13 plan.

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).

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).

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).

The plaintiffs' opposition erroneously recites the law on summary judgment. This is not a summary judgment motion. This is a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

The plaintiffs' opposition admits to errors in their complaint, including erroneously referring to $45,811.18, which should read $2,811.18. But, the complaint contains other errors as well, including a reference to a figure of $5,811.18, which is not explained by the plaintiffs. The complaint also erroneously alleges that the defendant filed the notice of mortgage payment change on May 1, 2016, when that notice was actually filed on March 31, 2016. Also, the complaint references exhibits that are not part of the complaint. The court sees no exhibits attached or filed as a separate document.

The complaint contains other errors, such as dates referring back to the year 2005, for example, even though there are no facts in this case pertaining to that year. See, e.g., Docket 1 at 3.

The plaintiffs concede that the second and third causes of action should be dismissed without leave to amend; they seek leave to amend their fifth, sixth and seventh claims.

In light of the many errors and inconsistencies in the complaint, and the plaintiffs' acknowledgment that five claims should be dismissed, the court will dismiss the complaint in its entirety.

The plaintiffs acknowledge that the second and third claims should be dismissed without leave to amend.

As to the fifth, sixth and seventh claims, there are no facts that would plausibly suggest liability under the referenced statutes, even if the court were to permit leave to amend. The claims are based on violations of 15 U.S.C. § 1681w (Federal Credit Reporting Act) and 15 U.S.C. § 1601 (Gramm-Leach Bliley Act). 15 U.S.C. § 1681w governs the disposal of consumer information records by entities such as the defendant.

15 U.S.C. § 1601(a) declares Congress' purpose "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

15 U.S.C. § 1601(b) declares Congress' purpose "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available . . . and to assure meaningful and accurate disclosures of lease terms in advertisements."

The court sees no plausible liability in the complaint's allegations that the defendant is attempting to collect on a debt already paid through the chapter 13, under the referenced sections of the FCRA or the Gramm-Leach Bliley Act. The complaint mentions only that the defendant "deliberately and/or recklessly did not maintain reasonable procedures to protect against reporting erroneous personal financial information." Docket 1 at 8-9.

The complaint does not allege that the defendant actually reported erroneous personal financial information of the plaintiffs or what that information might be, and it does not allege when the reporting took place. The complaint also does not allege that the defendant failed to adequately disclose terms of credit.

Furthermore, the fifth, sixth, and seventh claims are not core matters.

"Federal courts are *always* 'under an independent obligation to examine their own jurisdiction,' . . . and a federal court may not entertain an action over which it has no jurisdiction." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)(citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) and Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)).

A federal court has the obligation to review sua sponte whether it has subject matter jurisdiction under Article III's case-or-controversy requirement. Fed. R. Civ. P. 12(h)(3) (providing that "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action"); Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); Florida Wildlife Fed'n, Inc. v. South Florida Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011); see also Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc., 561 F.3d 1294, 1296 (11th Cir. 2009) (citing 28 U.S.C. § 1447(c)).

Bankruptcy jurisdiction extends to four types of title 11 matters, cases "under title 11," cases "arising under title 11," proceedings "arising in a case under title 11," and cases "related to a case under title 11." See Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006).

The first three types of title 11 matters are termed as core proceedings by 28 U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." Contra Stern v. Marshal, 131 S. Ct. 2594, 2608 (2011) (creating another category of core claims as to which the bankruptcy court cannot enter final judgment, treated as "cases related to a case under chapter 11"); see also Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165, 2172 (2014).

"Stern made clear that some claims *labeled by Congress* as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b). Stern did not, however, address how the bankruptcy court should proceed under those circumstances. We turn to that question now."

Bellingham Insurance at 2172.

28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to– (A) matters concerning the administration of the estate . . . [and] (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

On the other hand, "related to a case under title 11" proceedings are noncore, meaning that the bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1). Given the subject motion, though, consent of the parties is highly unlikely in this case.

Cases "under title 11" are the only ones over which district courts have original and exclusive jurisdiction. As to cases "arising under," "arising in," or "related to title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of bankruptcy case.'" Id.

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), adopting the "related to" jurisdiction standard of Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984)).

The fifth, sixth and seventh claims are not under title 11 and do not invoke a substantive right provided by title 11. Also, they are not claims that by their nature could arise only in the context of bankruptcy cases. They are claims based on non-bankruptcy federal statutes that are regularly litigated outside of bankruptcy.

"[R]elated to a case under title 11" jurisdiction is not applicable either because, when the plaintiffs obtained confirmation of their chapter 13 plan, the estate ceased to exist. Upon plan confirmation, in 2011, the chapter 13 estate's assets revested in the plaintiffs. The box for revestment has been checked by the plaintiffs. Case No. 10-49214, Docket 5 at 4. Thus, when the alleged wrongs took place, in 2016, there was no bankruptcy estate.

As such, the more limited post-confirmation jurisdiction standard of Pegasus and its progeny applies here. See State of Montana v. Goldin (In re Pegasus

Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005).

The treatment of the "related to" jurisdiction standard of Pacor by Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 164-65 (3rd Cir. 2004) shows that the post-confirmation jurisdiction test in Resorts and Pegasus was designed to apply only to post-confirmation jurisdiction where there is no bankruptcy estate any longer.

"A bankruptcy court's 'related to' jurisdiction is very broad, including nearly every matter directly or indirectly related to the bankruptcy." Wilshire Courtyard v. California Franchise Tax Board (In re Wilshire Courtyard), 729 F.3d 1279, 1287 (9th Cir. 2013) (quoting Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 868 (9th Cir. 2005)).

On the other hand, this court's post-confirmation jurisdiction is "necessarily more limited" than its pre-confirmation "related to" jurisdiction. State of Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 n.1 (9th Cir. 2005).

Under Pegasus, the test for post-confirmation jurisdiction, where there is no bankruptcy estate any longer, is whether "'there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.'" Pegasus at 1194 (quoting In re Resorts Int'l, Inc., 372 F.3d 154, 166-67 (3rd Cir. 2004)).

In applying the close nexus test, the Pegasus court focused on pre-confirmation links, namely, the Zortman Agreement and the plan itself. The Zortman Agreement was a settlement agreement among the debtor, the State of Montana, and other parties, that had been approved by the bankruptcy court few days prior to plan confirmation. Pegasus at 1192.

The Pegasus court concluded that matters affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus. Pegasus at 1193-94. The court indicated also that when the underlying litigation does not affect implementation of a plan but merely increases assets available for distribution under the plan, related to jurisdiction does not exist. "We specifically note that in reaching this decision, we are not persuaded by the Appellees' argument that jurisdiction lies because the action could conceivably increase the recovery to the creditors. As the other circuits have noted, such a rationale could endlessly stretch a bankruptcy court's jurisdiction." Pegasus at 1194 n.1 (citing Resorts, at 170); see also Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1133-35 (9th Cir. 2010); Sea Hawk Seafoods, Inc. v. State of Alaska (In re Valdez Fisheries Dev. Ass'n, Inc.), 439 F.3d 545, 548 (9th Cir. 2006); Heller Ehrman LLP v. Gregory Canyon Ltd. (In re Heller Ehrman LLP), 461 B.R. 606, 608-10 (Bankr. N.D. Cal. 2011).

In the more recent Wilshire Courtyard decision, the Ninth Circuit revisited the post-confirmation jurisdiction test under Pegasus, stating that:

"*The 'close nexus' test determines the scope of bankruptcy court's post-confirmation 'related to' jurisdiction. Pegasus Gold Corp., 394 F.3d at 1194. As adopted from the Third Circuit, the test encompasses matters 'affecting the "interpretation, implementation, consummation, execution, or administration of the confirmed plan."' Id. (quoting Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3d Cir.2004)). The close nexus test 'recognizes the limited nature of post-confirmation*

jurisdiction but retains a certain flexibility.' Id.

"*Applying the close nexus test in Pegasus Gold, we held that 'related to' jurisdiction existed because some claims concerning post-confirmation conduct—specifically, alleged breach of the liquidation/reorganization plan and related settlement agreement as well as alleged fraud in the inducement at the time of the plan and agreement—would 'likely require interpretation of the [settlement agreement and plan].' Id. The claims and remedies could also 'affect the implementation and execution' of the as-yet-unconsummated plan itself. Id.*

"*. . .*

"*The [lower court] BAP 'distill[ed]' too narrow a version of the 'close nexus' test from Valdez Fisheries and Ray: '[T]o support jurisdiction, there must be a close nexus connecting a proposed post-confirmation proceeding in the bankruptcy court with some demonstrable effect on the debtor or the plan of reorganization.' (Citation omitted). Valdez Fisheries and Ray simply applied the Pegasus Gold 'close nexus' test to the unique—and distinguishable—facts of those cases. We reaffirm that a close nexus exists between a post-confirmation matter and a closed bankruptcy proceeding sufficient to support jurisdiction when the matter 'affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan.' Pegasus Gold Corp., 394 F.3d at 1194 (internal citation and quotation marks omitted).*

"*The Pegasus Gold 'close nexus' test requires particularized consideration of the facts and posture of each case, as the test contemplates a broad set of sufficient conditions and 'retains a certain flexibility.' Id. Such a test can only be properly applied by looking at the whole picture.*

"*. . .*

"*Thus, under the 'close nexus' test, post-confirmation jurisdiction in this case extends to matters such as tax consequences that likely would have affected the implementation and execution of the plan if the matter had arisen contemporaneously. This application of the Pegasus Gold test does not prejudice either taxing entities or bankruptcy parties, nor requires the tax consequences to be assessed before transactions are consummated and taxes are due. It merely allows the bankruptcy court to retain jurisdiction over post-confirmation, post-consummation disputes related to the interpretation and execution of the confirmed Plan as if they had arisen prior to consummation. Thus, we reject CFTB's argument that jurisdiction was lacking because the bankruptcy case had been long since closed by the time the tax dispute began, and that neither the Plan nor Reorganized Wilshire could be affected.*"

Wilshire Courtyard at 1287, 1288-89, 1292-93.

This court may not entertain the fifth, sixth and seventh claims. Even if there were sufficient facts pleaded, rising to the level of plausible liability under those claims, there is no nexus — much less a close nexus — between what the defendant discloses about credit terms and does with the plaintiffs' consumer information records, and the plaintiffs' now discharged chapter 13 case.

Even assuming misconduct by the defendant under the fifth, sixth and seventh claims, there is nothing in the complaint even to suggest that such misconduct

affects the interpretation, implementation, consummation, execution, or administration of the confirmed chapter 13 plan. The complaint has no information to suggest that liability under the claims would somehow affect interpretation of the plan.

And, the plaintiffs' performance under the plan has been completed and the court has granted them a discharge. Any implementation, consummation, execution, or administration of the plan is moot at this time. The fifth, sixth and seventh claims will be dismissed also for lack of subject matter jurisdiction.

The motion will be granted in part.

3. 15-29421-A-12 JERRY WATKINS — MOTION TO DISMISS CASE 11-21-16 [74]
JPJ-1

Tentative Ruling: The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

This case was filed on December 2, 2015, over one year ago. The debtor still has not obtained plan confirmation. The court has held only one substantive hearing on plan confirmation, on October 17, 2016. Docket 70. At that hearing, the court denied confirmation based on the debtor's admission that his plan cannot be confirmed. Id. The remaining hearings on plan confirmation were either continued, dismissed as moot or voluntarily dismissed by the debtor. Dockets 37, 45, 47, 62, 63.

Although the debtor filed an amended chapter 12 plan on December 4, 2016 (Docket 82), this case has been pending for over a year now and the debtor has made it clear that he is not eager to move forward with this case. It is up to the debtor to prosecute confirmation of his chapter 12 plan. The delay has been prejudicial to creditors and it is cause for dismissal. The motion will be granted and the case will be dismissed.

4. 15-29136-A-12 P&M SAMRA LAND INVESTMENTS L.L.C. — MOTION TO CONVERT CASE 9-8-16 [331]
MAS-6

Tentative Ruling: The motion will be denied without prejudice.

The court continued the hearing on this motion from October 17 to November 14, in order to assess the further filings promised by the debtor in connection with Ag's motion for sanctions. The court further continued the hearing to November 28 and then to December 12, at the request of the debtor. As the record on this motion has closed, the ruling posted for November 28 follows below.

Creditor Ag-Seeds Unlimited renews its motion to convert this case from chapter 12 to chapter 7 on the ground that the debtor has committed fraud. A prior

motion to convert was denied without prejudice because it was not served correctly. That imperfection has been corrected. Docket 204. The instant motion argues that the debtor and its counsel have defied a court order to comply with a Rule 2004 examination and produce documents and that such noncompliance amounts to fraud. Also, Ag's counsel has argued that Paul Samra's wife and son have been taking cash from the debtor for their own purposes.

Secured creditor IRA Services Trust Co. CFBO, Shankuntala D. Saini, has filed a joinder in the motion. Docket 363.

Conversion of a chapter 12 case to chapter 7 may be granted pursuant to a request by the debtor under 11 U.S.C. § 1208(a) or pursuant to a request by a party in interest, such as a creditor, under 11 U.S.C. § 1208(d). But, the court may convert the case on a motion by a party in interest only "upon a showing that the debtor has committed fraud in connection with the case." 11 U.S.C. § 1208(d).

The court has seen nothing in the record before it suggesting that the debtor has committed fraud in connection with this case. The movant does not offer, and the court cannot find, any case law supporting the contention that failure to comply with court discovery orders amounts to fraud.

Specifically, the debtor's further filings in connection with the motion for sanctions indicate that there may be invoices and receipts at least for some of the cash purchases done by Paul Samra's wife and son. The debtor has apparently discovered documents that should have been produced but were not produced by the debtor to Ag pursuant to the March 23, 2016 Rule 2004 order. Docket 418. As such, the court cannot conclude that Paul Samra's wife and son have been taking cash from the debtor for their own purposes.

The movant has other remedies for the debtor's failure to obey court discovery orders, including, without limitation, relief under Fed. R. Bankr. P. 2005 and further sanctions against the debtor and the debtor's counsel. The motion will be denied without prejudice.

The court will strike the joinder to the motion. Docket 363. The civil and bankruptcy rules do not allow for the joinder of parties to motions or oppositions to motions.

5.	15-29136-A-12 MAS-8	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION FOR CONTEMPT AND/OR SANCTIONS 9-15-16 [342]

Tentative Ruling: The motion will be granted.

The court continued the hearing on this motion from October 17, 2016 to November 14, in order to permit the debtor to file additional papers concerning its production of documents. The court further continued the hearing to November 28 and then to December 12, at the request of the debtor. As the record on this motion has closed, the ruling from November 28 follows below.

Creditor Ag-Seeds Unlimited (Ag) seeks an order holding debtor P&M Samra Land Investments, L.L.C., and its counsel, Noel Knight, in contempt for failure to obey a court discovery order and for sanctions of not less than $12,079.90. Ag also requests an order to show cause as to why the debtor and its counsel should not be held in criminal contempt for failure to comply with discovery.

This court has inherent authority to impose sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The authority covers a broad range of conduct that goes beyond the violation of an order. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). While it may be used to impose civil contempt sanctions, this inherent authority may be applied without resorting to contempt proceedings, but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003) (noting that the inherent sanction authority, and civil penalties in general, must either be compensatory in nature or designed to coerce compliance); see also Miller v. Cardinale (In re Deville), 280 B.R. 483, 495 (B.A.P. 9th Cir. 2002) (citing and discussing Chambers at 42-51 and Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996)).

Chambers, at 43, holds that the inherent sanction authority includes power to control admission to the court's bar and to discipline attorneys who appear before the court. See also Lehtinen at 1059 (reminding the suspended attorney that attorney disciplinary proceedings are neither civil nor criminal in nature and are not for the purpose of punishing but to maintain the integrity of the courts and the profession).

To exercise its inherent authority to sanction, a court must make explicit finding of bad faith or willful conduct, which is conduct more egregious than mere negligence or recklessness. Lehtinen at 1058.

Bad faith is determined by examining the totality of the circumstances. In re Rolland, 317 B.R. 402, 414-15 (Bankr. C.D. Cal. 2004). The misrepresentation of facts, the unfair manipulation of the Bankruptcy Code, the history of filings and dismissals, and the presence of egregious behavior are all factors to be considered in determining whether bad faith exists." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

A finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

A violation of an order is willful when the respondent knows of the order and intentionally performs the action violating it. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002).

The court ordered a Rule 2004 examination and a document production per Ag's request on March 23, 2016. Dockets 56 & 59.

Thereafter, Ag filed a motion to compel compliance with the order and for sanctions. On June 13, the court entered an order directing the debtor to produce the documents in the subpoena and awarding compensatory sanctions against the debtor and its counsel, Noel Knight, jointly and severally.

Believing that the debtor had failed to comply with the June 13 order, Ag filed another motion to compliance and for sanctions. This prompted the debtor's promise to comply with the court's orders but then it once again failed to comply. The court granted Ag's second motion and awarded the $1,985 in sanctions jointly and severally against both the debtor and Mr. Knight. The court made detailed findings as to numerous violations of its orders. See Docket 246. The court incorporates by reference those findings and conclusions. Id.

In its order granting Ag's second motion, the court provided:

- In the event the documents are not produced to Ag's counsel by August 18, the court assesses further sanctions — calculated to coerce future compliance — jointly and severally against both the debtor and Mr. Knight, in the amount of $300 a day, for every day the documents are not produced after August 18.

- The court will also order Paul Samra to appear for a further Rule 2004 examination no later than August 29, 2016, to provide Ag-Seeds with the information he failed to disclose at the July 15 examination, on the basis that he did not know.

- In the event Paul Samra does not make himself available prior to August 29 for another Rule 2004 examination, at a time also convenient for Ag-Seeds' counsel, the court assesses further sanctions — calculated to coerce future compliance — jointly and severally against both the debtor and Noel Knight, in the amount of $200 a day, for every day Paul Samra does not make himself available for a further examination after August 29.

- The court will issue an order to show cause for why the debtor and Noel Knight should not be additionally sanctioned for their misconduct as described in this ruling. The hearing on this order shall be on September 6, 2016 at 10:00 a.m. The debtor and Mr. Knight may file any papers in connection with the order no later than August 22, 2016.

Docket 247, August 17, 2016 Order.

At the September 6, 2016 hearing on the order to show cause, the court determined that Mr. Knight and the debtor did not respond or attempt to further explain their conduct outlined in the court's ruling on Ag's second motion to compel and for sanctions, and did not address why the court should not assess additional sanctions against them, beyond the sanctions requested by Ag's second motion. Docket 318. The court then ordered the debtor and Mr. Knight, jointly and severally, to pay sanctions of $2,000. Docket 330.

Ag's instant motion establishes that Ag has not received documents from the debtor pertaining to the loans secured by the debtor's real property and has not received Quicken/Quickbooks records, ledgers, detailed income and expense statements, and the like. Docket 344.

The court continued the hearing on this motion from October 17 in order to provide the debtor with opportunity to explain what it has already produced to Ag, when it was produced, what has not been produced, and why it has not been produced. Specifically, the court instructed the debtor to have the person most knowledgeable, as required by the subpoena, execute a declaration attesting to these issues.

The debtor's further pleading concerning the document production is titled, "Debtor's Response to Court Request for History of All Document Production to AG Seeds Unlimited; Corrected with Signature Addition Page 6." Docket 418. The response consists of information about documents previously produced to Ag, how documents were produced to Ag, when documents were produced, which documents were not produced, and new documents discovered by the debtor and recently produced to Ag. Docket 418.

However, the debtor's response is wanting.

The response is executed by the debtor's counsel, Noel Knight, declaring that "I hereby attest, under penalty of perjury, that all of the above commentary on Debtor document production and submitted documentation is correct and truthful." Docket 418 at 8.

Yet, the response does not state that Mr. Knight has personal knowledge about the information in it. And, he is not the custodian of the debtor's documents, nor is he the person most knowledgeable about the debtor's affairs or its records. Throughout this proceeding, the debtor has tendered Paul Samra, its managing member, as the person most knowledgeable concerning the debtor's affairs and its books and records.

The response, while signed by Paul Samra, is signed only in his individual capacity. He has not signed it on behalf of the debtor. Docket 418 at 9.

More, his attestation that "the matters stated therein are true" is based on information and belief. "I am informed and believe . . . ." Docket 418 at 9. He is admitting that he does not necessarily have personal knowledge of the information in the response. The response says nothing about his personal knowledge of the information in the response. See Fed. R. Evid. 602.

For instance, the response refers to newly discovered documents in Hood, California. Yet, Paul Samra does not say that he discovered the documents or was present at their discovery. Paul Samra's signature and attestation merely refer to the several attestations and signatures of Noel Knight in the response, as basis for his attestation that the information in the history is true. In other words, Mr. Samra attests that, based on what Mr. Knight told him, the facts in response are true.

In short, the signatures and attestations of Mr. Knight and Paul Samra purporting to establish and authenticate the statements in the response are meaningless.

Further, even if true, the statements in the response are vague, ambiguous and incomplete.

For example, the response provides a list of documents admittedly not produced to Ag, including, without limitation, documents relating to the transfer of assets, account books, records, ledgers, etc. Docket 418 at 5-6. Documents on the list are not numbered in sequential order and the court cannot tell whether documents are missing, they are misnumbered or the debtor is using the numbers from the subpoena to identify the documents. In the list, documents 1-6, 8-10, 14-15 and 19-21 appear to be missing. Docket 418 at 5-6. The court should not have to speculate about this.

The response also states that the documents not produced to Ag "were not available for transmission or in existence at the time of the above listed document productions, nor in our possession or control." Docket 418 at 5.

But, the court cannot tell what "not available" or "not in existence" means. As the debtor just discovered many new documents, which is discussed in more detail below, it seems the debtor had the documents, or many of them, all along — it just had not searched for them. If documents were truly not available for transmission, the debtor has not explained why they were not available. Not once has the debtor objected to the document production or sought a protective order during the last approximately eight months, identifying documents that were not available for production and explaining why they were not available.

The same is true as to documents not in existence. The debtor has not identified a single document not produced because it was not in existence at the time the court entered the March 23 order.

Also, with regard to some of the missing documents, Mr. Knight further declares in another signed statement that, "I hereby attest, under penalty of perjury, that the Debtor does not have available nor maintains the following . . . Check Registers, Book Ledgers, and Bookkeeping paraphernalia." Docket 418 at 7.

Immediately after the above statement, Mr. Knight further declares that "Debtor has now acquired software to address all record keeping deficiencies." Id.

Yet, there is nothing in the response explaining why the debtor never maintained bookkeeping records. This is especially important as Paul Samra admits in a declaration that "over the past 3 years, [he] ha[s] made periodic cash disbursements to both [his] wife Manit and [his] son Steven for the purchase of parts, goods, supplies, and services for which, there may not be either invoice or receipt." Docket 418 at 11. Paul Samra's wife, Manjit Samra, also admits that "[she] may not have a receipt for [the purchase or farm related parts and supplies]." Docket 418 at 13.

These statements beg the question of why the debtor has not maintained bookkeeping, even after the filing of this case. This case has been pending for approximately one year, since November 24, 2015. And only now — one year into the case – the debtor is starting to keep records.

If not fraud, at best this is evidence of bad faith and gross mismanagement of the debtor.

Other problematic statements follow. The response admits that the debtor has just discovered "boxes stored at its Hood, California property" containing "receipts, paper invoices, and bank statements," which will be provided to Ag. Docket 418 at 7.

The response also states that the debtor will be providing or has provided the following documents to Ag: "Scott Chau Promissory Note," "Receipt for Interest Payment to Scott Chau," "Thiel Note," "Saini Note," and "River City Bank Statements, May to August 2014." Docket 418 at 7-8.

At its "Hood, California property location," the debtor further admits to "locat[ing] about 4 more boxes containing cash receipts, payment receipts, and assorted invoices related to P & M Samra and will provide one collective PDF of content via e-mail on November 7, 2016." Docket 418 at 8.

The debtor does not say when it discovered the above documents, but it must have been after the October 17 hearing on this motion, as the documents were not mentioned prior to that date. Nevertheless, there is no explanation as to why the debtor did not look for these documents earlier. The court's March 23, 2016 document production order was entered nearly eight months ago. The question is why it has taken eight months of time consuming and expensive litigation to motivate the debtor to locate and produce these documents.

The debtor also does not say who located the new documents. This is important because there is no evidence of Paul Samra or Mr. Knight having personal knowledge as to the discovery of the documents.

The response also lists "DOCUMENTS NOT IN CONTROL OF DEBTOR WHICH CAN BE

OBTAINED AND PRODUCED," including "Communications between Debtor and All Financial Institutions," "2015 and 2016 River City Bank Statements," and "2015 Bank Statements from Bank of Feather River."

But, the debtor does not say why it did not promptly obtain the above-mentioned documents.

In summary, the debtor's statements in the response (Docket 418) are unhelpful, ambiguous and lacking in crucial detail. The statements do not change the fact that the debtor's failure to immediately search for, identify, and produce the requested documents has caused approximately eight months of time-consuming and expensive litigation, not to mention violation of court order.

The debtor's statements in the response, even if true, demonstrate that the debtor has had many of the requested documents in its possession or control and that they should have been promptly located and produced to Ag. Nonetheless, the debtor ignored its responsibility to locate and produce these documents on multiple occasions, despite multiple motions for sanctions and orders of this court.

The court already issued coercive sanctions of $300 per day from and after August 18, 2016, but many of those court ordered documents were not produced by the initial October 17 hearing on this motion. See Dockets 246 & 247. The "discovery" of the documents in Hood makes this abundantly clear. See Docket 418.

Ag has requested sanctions related to attorney and court reporter time spent in obtaining the documents in addition to coercive sanctions of $8,400 plus $300 per day from and after September 15, 2016 until the earlier of (a) the date of the hearing on this motion or (b) the actual production of the previously ordered documents.

The continued failure of the debtor to produce documents requested by Ag's March 22 subpoena and lack of disclosure of basic information about the debtor's operations by Paul Samra at the July 15 and August 29 examinations made the filing of this motion necessary. The debtor's further response to this motion demonstrates that the debtor has been engaging in willful misconduct by not locating and producing the documents required by the court's March 23 order. This is bad faith.

The court will award the requested sanctions in the amount of $21,679.90 as follows:

(1) $18,000 (representing $300 of coercive sanctions per day from August 18, 2016 through October 17, 2016), solely against the debtor;

(2) $2,695 for 6 hours of work performed by Ag' counsel at an hourly rate of $350 in preparation for unfruitful Rule 2004 examinations on July 15, 2016 and August 29, 2016, in addition to 1.8 hours spent preparing the instant motion, against the debtor; and

(3) $984.90 for work performed by the court reporter at an hourly rate of $235 at the aforementioned examinations, jointly and severally against the debtor.

The $18,000 in sanctions shall be paid to the court by a cashier check, made payable to the United States Treasury, within seven days of entry of the order on this motion. The other $3,679.90 ($2,695 + $984.90) in sanctions shall be

paid by a cashier check directly to Ag' counsel, Mark Serlin, within seven days of entry of the order on this motion.

The debtor shall be prohibited from utilizing any documents not produced by the November 14 hearing date on this motion, for any claim, defense or assertion in this bankruptcy proceeding.

The above sanctions are awarded to coerce the debtor's compliance with the court's orders and compensate Ag for having to enforce its right to the documents.

The court will not issue an order to show cause regarding criminal contempt as this exceeds the jurisdiction of a bankruptcy court. The Ninth Circuit has held that a bankruptcy court may "impose civil contempt sanctions, [. . .] but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003).

The debtor filed two motions apparently in response to this motion. The first is a countermotion to extend the automatic stay and for sanctions. Docket 369. The court has not awarded any damages to the debtor that would offset the sanctions ordered herein.

The second is the debtor's October 3, 2016 "reply" to the instant motion which will be stricken because it is devoid of any evidence establishing its factual assertions, such as a declaration or affidavit. Docket 366.

The debtor's initial opposition/response to this motion lacks merit and is non-responsive. It does not deny that the debtor has failed to produced documents requested by Ag' subpoena. It says that the debtor provided "99.9% of all chapter 12 documentation in its possession." Docket 366 at 2.

It does not deny the debtor having the documents requested by Ag's subpoena and still not received by Ag. It does nothing to explain the violations of the June 13 order.

6.	15-29136-A-12 NCK-6	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO CONFIRM PLAN 8-29-16 [264]

Tentative Ruling: The motion will be denied.

The court continued the hearing on this motion from October 17, 2016 to November 14, in order to permit the debtor to file additional papers concerning its production of documents to creditor Ag-Seeds. The court further continued the hearing to November 28 and then to December 12, at the request of the debtor. As the record on this motion has closed, the ruling from November 28 follows below.

The debtor seeks confirmation of its "corrected" third amended chapter 12 plan, filed on August 29, 2016. Docket 264.

Each of the following parties has filed opposition to confirmation of the plan:

- the Socotra Fund, L.L.C., along with Gary E. Roller, trustee of the Gary E. Roller Profit Sharing Plan and the Petit Revocable Trust, dated March 29, 1999 (first mortgage holder on the debtor's farm real property);

- IRA Services Trust Co. CFBO (second mortgage holder on the debtor's farm real property) and trust settlor Shankuntala Saini;

- unsecured creditor Ag-Seeds Unlimited.

Plan confirmation will be denied for the following reasons:

(1) This case is not being prosecuted in good faith and the plan is not proposed in good faith because the debtor has repeatedly violated discovery-related orders of the court. Thus, creditors have not been able to ascertain information about the debtor's income, expenses, and operations. The court incorporates by reference its ruling on Ag's latest motion for sanctions, also being heard on this calendar, DCN MAS-8.

(2) Neither the plan nor the evidence in support of its confirmation provide sufficient detail to warrant a conclusion that it is feasible. The plan states that the debtor will implement the plan by "continuing its farming operations," but fails to elaborate with projections of revenue suggesting the plan payments will be made. Docket 266 at 7.

(3) Further, the plan's feasability apparently hinges on contributions from Stone Lake Farm Enterprises, Inc., "to the extent necessary." Id. Reliance on open-ended contributions from a third party is not likely feasible. The failure to identify an approximate amount of the contributions precludes the court from analyzing the likelihood that such contributions will be made.

(4) The arrangement with creditor Michael Thiel to pay $30 a month for the rental of a residence on the estate's real property prejudices other creditors, including the three mortgage creditors senior to the Thiel Trust, because the debtor is not receiving fair market rental value for that residence, while the plan is paying only interest to the senior mortgage creditors.

The court finds it unnecessary to address other basis for plan confirmation denial.

7. 10-21350-A-11 JOHN/SHEILA WALKER — MOTION FOR ENTRY OF DISCHARGE 11-28-16 [326]
WW-12

Tentative Ruling: The motion will be denied without prejudice.

The debtors ask the court to enter their discharge pursuant to 11 U.S.C. § 1141(d)(5), which provides that:

"*In a case in which the debtor is an individual—*

"*(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;*

"*(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if —*

"*(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not*

less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

"*(ii) modification of the plan under section 1127 is not practicable; and*

"*(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that —*

"*(i) section 522(q)(1) may be applicable to the debtor; and*

"*(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).*"

The court cannot grant a discharge under 11 U.S.C. § 1141(d)(5)(A) as the debtors admit to not having completed all payments under their confirmed plan. Docket 328.

Nor can the court cannot grant a discharge under 11 U.S.C. § 1141(d)(5)(B). This subsection requires that the debtors have already distributed to unsecured creditors under the plan not less than the amount that would have been paid to such claimants under a chapter 7 liquidation. The debtors have not established this.

The total value of nonexempt assets at the time of plan confirmation was $36,541. Docket 212, Ex. A. Yet, the debtors have not established in the motion that they have paid at least this much to unsecured creditors.

The motion states that some priority claims have been paid in full (*e.g.*, IRS and California Franchise Tax Board), without identifying the amount of these claims. Docket 328 at 2. It also states that only $11,784.84 of the $41,000 to be distributed to general unsecured creditors under the plan, have been paid. Docket 328 at 2-3. Hence, the court is not convinced from the motion that at least $36,541 has been paid to unsecured creditors.

Finally, the declaration in support of the motion says nothing about whether section 522(q)(1) is applicable to either of the debtors and whether there is a pending proceeding where either of the debtors may be found guilty of a felony as prescribed by section 522(q)(1)(A) or liable for a debt as prescribed by section 522(q)(1)(B). Docket 328.

And, even if the supporting declaration contained the above information, there is only one supporting declaration, signed by only one of the debtors, Sheila Walker. The other debtor, John Walker, has not signed a declaration in support of this motion.

8. 16-24261-A-7 C.C. MYERS, INC. MOTION TO
DNL-12 SELL FREE AND CLEAR OF LIENS
11-7-16 [277]

Final Ruling: Given the trustee's stipulation with the United States Trustee over the continuance of the hearing on this motion, the court will continue the hearing on the motion to December 19, 2016 at 10:00 a.m. Docket 322.

9. 16-21585-A-11 AIAD/HODA SAMUEL
RJ-4

MOTION TO APPROVE STIPULATION
11-28-16 [400]

Tentative Ruling: The motion will be denied without prejudice.

The debtor, Aiad Samuel, seeks approval of a stipulation between him and the chapter 11 trustee for the abandonment of a claim against Brake Masters and an appeal from a state court judgement entered against the debtor, pertaining to the claim.

First, 11 U.S.C. § 554 permits the abandonment of assets only upon a showing, either by the trustee or a party in interest, that the asset to be abandoned is "burdensome to the estate or . . . is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a) & (b). In other words, there must be a showing that the claims and appeal from the judgment are burdensome to or of inconsequential value and benefit to the estate.

No such showing has been made here. The motion simply asks for the approval of a stipulation over the abandonment of the claims and appeal.

Even though the court may approve a stipulation over the abandonment of assets, the approval of this stipulation does not satisfy the requirements of section 554. The motion merely recites the terms of the stipulation, where it is stated that "[t]he [t]rustee is informed and believes that the costs of prosecuting the State Action or the Appeal are likely to outweigh any potential benefits to the bankruptcy estate." Docket 400 at 3.

There is no declaration from the trustee in support of the motion, attesting to his opinion about the value of the claims and appeal. His statement in the instant motion is hearsay, at best, assuming it was even made by him.

And, even if in a declaration, his statement admits to not having personal knowledge about the value of the claims and appeal. The statement is based on information and belief, thus admitting that the trustee is not stating his opinion about the value of the subject assets from information he knows first hand. He is relying on someone else who has relayed the information about the value of the asset to him. Thus, even if the trustee were to make that statement in a declaration, the statement negates him having personal knowledge about the value of the assets. See Fed. R. Evid. 602.

Second, the motion is plagued with service issues. It has not been served or properly served on all creditors as required by Fed. R. Bankr. P. 6007(a), which provides that:

"Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code."

The motion was served only on counsel for creditors and not on the creditors themselves. Docket 402.

Fed. R. Bankr. P. 9013 and 9014(a) provide that a request for an order shall be made by a motion. Fed. R. Bankr. P. 9014(b) further provides that a motion must be served in the manner provided for service of a summons and a complaint. Fed. R. Bankr. P. 7004(b) permits service of a summons and a complaint by first

class mail.

Nothing in Fed. R. Bankr. P. 7004 permits service on the creditors' counsel to the exclusion of the creditors. And, while many creditors in this case have filed requests for special notice, such requests only *add* addresses to where notices should be sent. They do not do away with the requirements for service under the Federal Rules of Bankruptcy Procedure.

For example, the request for special notice by Tri Counties Bank requests that "the following [address] be *added* to the Court's Master Mailing List." Docket 15 (emphasis added).

Third, each of the requests for special notice requires service at a physical address. See Dockets 14, 15, 22, 23, 25, 28, 29, 36, 39, 43, 87, 148, 149, 218. However, the proof of service for the motion reflects service only at electronic addresses. Docket 402.

Finally, Michael Mandell, one of JPMorgan Chase Bank's counsel, has not been served with the motion, electronically or otherwise. Dockets 87 & 402.

Given the foregoing, the motion will be denied.