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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re )  
Ia Vang Xiong, )  
Debtor. )  
\_\_\_\_\_ )

Case No. 10-65087-B-13

Yeng Yang, )  
Plaintiff, )

Adversary Proc. No. 11-1120

v. )  
Ia Vang Xiong, )  
Defendant. )  
\_\_\_\_\_ )

**MEMORANDUM DECISION REGARDING  
MOTION TO DISMISS COMPLAINT**

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9<sup>th</sup> Cir. BAP Rule 8013-1.

Peter L. Fear, Esq., appeared on behalf of the debtor/defendant, Ia Vang Xiong.

Jeffrey D. Bohn, Esq., appeared on behalf of the plaintiff, Yeng Yang.

Before the court is a motion (the “Motion to Dismiss”), filed by the debtor/defendant, Ia Van Xiong (the “Debtor”), to dismiss with prejudice this adversary proceeding to determine the dischargeability of a debt. The plaintiff, Yeng Yang (the “Plaintiff”), missed the deadline to file an objection to the dischargeability of her claim. Because the Plaintiff did

1 not request an extension of that deadline, the late-filed complaint (the  
2 “Complaint”) is time-barred unless it relates back to a timely-filed pleading.  
3 The Plaintiff contends that the Complaint should relate back to an earlier  
4 motion for relief from stay (“Motion for Relief”). Because the Motion for  
5 Relief does not satisfy the procedural requirements for a complaint, it is not  
6 a “deficient pleading” to which the Complaint can relate back. The Motion  
7 to Dismiss will be granted.

8 This memorandum decision contains findings of fact and conclusions  
9 of law required by Federal Rule of Civil Procedure 52(a), made applicable  
10 to this adversary proceeding by Federal Rule of Bankruptcy Procedure  
11 7052).<sup>1</sup> The bankruptcy court has jurisdiction over this matter pursuant to  
12 28 U.S.C. §§ 1334 and 157, 11 U.S.C. § 523 and General Orders 182 and  
13 330 of the U.S. District Court for the Eastern District of California. This is  
14 a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(I).

15 **Background and Findings of Fact.**

16 On December 31, 2010, the Debtor filed a petition under chapter 13,  
17 together with a verified master address list which included the Plaintiff at  
18 her attorney’s office address. The Debtor’s schedule F listed the Plaintiff as  
19 an unsecured creditor with a claim described as, “Lawsuit filed 9/24/08  
20 based on incident 6/9/08” and valued at \$0 (the “Plaintiff’s Claim”). The  
21 Debtor’s Statement of Financial Affairs disclosed, under “Suits and  
22 administrative proceedings,” the Plaintiff’s “Complaint for personal injury,  
23 assault, battery, negligent infliction of emotional distress” (the “State Court  
24 Action”).

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25  
26 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to  
27 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of  
28 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after*  
October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1           On January 14, 2011, the court issued and mailed to each creditor  
2 listed in the master address list a two-page document titled: “Notice of  
3 Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines” (the  
4 “Case Notice”). The deadlines for taking certain actions are listed on the  
5 first page of the Case Notice with the caveat (emphasis original):  
6 **“Deadlines**—Papers must be *received* by the bankruptcy clerk’s office by the  
7 following deadlines.” The deadline relevant to this Motion to Dismiss is,  
8 **“Deadline to Object to Debtor’s Discharge *or* to Challenge the**  
9 **Dischargeability of Certain Debts: 04/11/2011.”** The reverse side of the  
10 Case Notice contains detailed explanations of the terms used in the Notice  
11 and of the relevance of the deadlines. The Plaintiff does not deny receipt of  
12 the Case Notice.

13           On April 8, 2011, the Plaintiff filed the Motion for Relief to pursue  
14 the pending State Court Action. The Motion for Relief alleged in a  
15 conclusory statement that the Plaintiff’s Claim is “nondischargeable in  
16 nature” and sought leave to have the dischargeability issue adjudicated in  
17 the state court:

18           “1) the bankruptcy case was filed in bad faith specifically to  
19 delay, hinder or interfere with [Plaintiff’s] prosecution of the  
20 non-bankruptcy action; 2) the claims are nondischargeable in  
21 nature and can be most expeditiously resolved in the non-  
22 bankruptcy forum; 3) the claims at issue (personal injuries to  
[Plaintiff] from battery committed by [Debtor] arise under  
non-bankruptcy law and can be most expeditiously resolved in  
the non-bankruptcy forum.”

23 Motion for Relief, 2:17-23, April 8, 2011.

24           The nature of the tort claims pled in the State Court Action were  
25 described in a declaration from the Plaintiff’s attorney: “The causes of  
26 action pleaded [sic] in the non-bankruptcy forum are: Assault, Battery,  
27 Intentional Infliction of Emotional Distress, and Negligent Infliction of  
28 Emotional Distress.” Attached to the attorney’s declaration is a copy of the

1 complaint filed in the State Court Action.

2 On April 26, 2011, the Plaintiff filed the Complaint in this court  
3 objecting to discharge of the Plaintiff's Claim pursuant to § 523(a)(6),  
4 based on alleged willful and malicious injury. On April 27, 2011, the  
5 Debtor filed an opposition to the Motion for Relief on the grounds that, (1)  
6 the Plaintiff had not filed a proof of claim in the bankruptcy proceeding,  
7 and (2) the deadline for objecting to the discharge of the Plaintiff's Claim  
8 had already passed. The Motion for Relief was denied at a hearing on July  
9 7, 2011.

10 **Issues Presented.**

11 The Plaintiff's Complaint was filed in this court after the bar date  
12 had already passed. Unless the Complaint can relate back to the Motion for  
13 Relief, it is untimely and must be dismissed. Thus, the issue presented is  
14 whether or not the Motion for Relief is a pleading which substantially  
15 complies with the requirements for a complaint in Federal Rule of Civil  
16 Procedure 8 (made applicable to this adversary proceeding by FRBP 7008)  
17 and would constitute a "deficient pleading" to which the Complaint can  
18 "relate back."<sup>2</sup>

19 **Analysis and Conclusions of Law.**

20 **Applicable Law.**

21 Under Federal R. Bankr. P. 4007(c), a complaint to determine the  
22 dischargeability of a debt under § 523(a)(6) had to be filed not later than 60  
23 days after the first date set for the meeting of creditors under § 341(a) (the  
24 "Bar Date"). Here, the Bar Date was April 11, 2011, and the Plaintiff  
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26 <sup>2</sup>The Plaintiff also filed an objection to confirmation of the Debtor's  
27 chapter 13 plan on April 8, 2011, which makes reference to the State Court  
28 Action and to the Motion for Relief. The Plaintiff does not contend that  
this document constitutes a "deficient pleading."

1 received notice of the Bar Date in the Case Notice.

2       There is no disagreement that the Complaint initiating this adversary  
3 proceeding was filed after the Bar Date. The Bar Date was subject to an  
4 extension only if the Plaintiff filed a timely motion for an extension of the  
5 Bar Date upon a showing of “cause.” No request for an extension was filed  
6 and the Rules do not provide for relief from the Bar Date based on  
7 “excusable neglect.”<sup>3</sup> The Complaint therefore is untimely unless this court  
8 determines that the Complaint “relates back” to a prior timely filed  
9 “deficient pleading.” That document here is the Motion for Relief.

10       The procedural rule for pleading a claim for relief in federal court is  
11 FRCP 8, which applies to adversary proceedings. Rule 7008. “In the  
12 bankruptcy context, we construe a deficient pleading liberally, if the  
13 pleading substantially complies with the requirements of a complaint by  
14 giving the debtor ‘fair notice of what the plaintiff’s claim is and the grounds  
15 upon which it rests.’” *Markus v. Gschwend (In re Markus)*, 313 F.3d 1146,  
16 1149 (9<sup>th</sup> Cir. 2002)(citing *Dominguez v. Miller (In re Dominguez)*, 51 F.3d  
17 1502, 1508 (9<sup>th</sup> Cir. 1995)).

18       The Ninth Circuit has addressed the “relation back” issue in three  
19 cases with different results. In the case *Classic Auto Refinishing, Inc. v.*  
20 *Marino (In re Marino)*, 37 F.3d 1354 (9<sup>th</sup> Cir., 1994), the Court explained  
21 the essential requirements a document must meet in order for it to be  
22 denominated as a “complaint,” albeit a deficient one, and held that the  
23 document in question failed to do so. In a subsequent case, *In re*

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25       <sup>3</sup>This “strict construction” standard is supported by the fact that Rule  
26 9006(b), the general procedural rule for enlarging the time limits under the other  
27 Rules, specifically excludes the deadlines in Rules 1017(e), 4004(a) and 4007(c)  
28 from its application. Rule 9006(b)(3). As a result of this exclusion, the courts  
may not consider an untimely motion to enlarge the 60-day deadline in those  
Rules and may not consider whether the failure to act was the result of excusable  
neglect. Rule 9006(b)(1).

1 *Dominguez*, the Court determined that the document in question *did* meet  
2 the requirements and deemed it to be a timely-filed “deficient complaint” to  
3 which the subsequent untimely pleading could “relate back.” 51 F.3d at  
4 510. Finally, in *In re Markus*, the Court compared the holdings in *Marino*  
5 and *Dominguez* and narrowed the definition of a “deficient pleading.” 313  
6 F.3d at 1149-51.

7 In *Marino*, the creditor held a state court judgment of \$741,000  
8 against the debtor based on fraud and breach of contract. In response, the  
9 debtor filed a chapter 11 bankruptcy case. The creditor’s state court  
10 counsel did not timely object to discharge of the claim. However, before  
11 the bar date passed, the creditor did file an “Opposition to Sale” of some  
12 assets. That pleading was accompanied by an attorney’s declaration and  
13 copy of the state court complaint. The attorney then filed a formal  
14 complaint one day after he learned that the bar date had passed; the debtor  
15 moved to dismiss the complaint as untimely under Rule 4007(c). The  
16 creditor argued that the complaint related back to its “Opposition to Sale.”

17 The bankruptcy court agreed with the debtor and dismissed the  
18 complaint. The BAP affirmed and the Ninth Circuit agreed, citing FRCP 15  
19 and explaining that a complaint can only relate back to a *pleading*, in this  
20 case a complaint. The Court concluded that the “Opposition to Sale” and  
21 the documents filed with it did not substantially comply with the  
22 requirements of a complaint and so the relation back doctrine could not  
23 render the complaint timely. *In re Marino*, 37 F.3d at 1356.

24 While the purpose of notice pleading mandates that pleadings be  
25 construed to do substantial justice, “the policy of construing pleadings  
26 liberally does not justify the conclusion that *any document filed in a court*  
27 *giving some notice of a claim* satisfies the requirements of the Federal  
28 Rules. The documents filed . . . taken as a whole, do not satisfy the

1 requirements for a complaint.” *Id.* at 1357 (emphasis added).

2         The following year in *Dominguez* the Court distinguished its holding  
3 in *Marino* and concluded that the creditors’ documents *did* constitute a  
4 “deficient complaint.” There, the creditors held claims for over \$5 million  
5 and were active in the chapter 11 proceedings from the beginning. The  
6 chapter 11 trustee filed a liquidating plan which proposed to discharge all  
7 debts not explicitly excepted in the plan. The creditors objected and argued,  
8 based on § 1141(d)(3), that confirmation of the trustee’s plan could not  
9 discharge their claim as a matter of law. Before the confirmation hearing,  
10 the creditors pled their argument in a document titled “Memorandum Re:  
11 Relationship between Order Confirming Trustee’s Plan and Debtor’s  
12 Discharge.” *In re Dominguez*, 51 F.3d at 1505.

13         The *Dominguez* Court upheld the BAP’s decision affirming the trial  
14 court and held that the “Discharge Memorandum” qualified as a complaint,  
15 “because it challenged [debtor’s] right to a discharge and provided  
16 appropriate allegations and at least some substantive evidence to support the  
17 challenge.” *Id.* at 1505-06. The Court cited *Marino*, which it characterized  
18 as, “affirming a BAP dismissal primarily because the document alleged to  
19 serve the function of a complaint did not demand a judgment of  
20 nondischargeability.” *Id.* at 1506. Rule 8 requires not only a “short and  
21 plain statement of the claim showing that the pleader is entitled to relief,”  
22 but “also requires a reference to the Code section to which the adversary  
23 proceeding relates.” *Id.* at 1509. The Court held that the case was  
24 distinguishable from *Marino*.

25         [Debtor] received timely notice that the [creditors] were  
26 contesting his right to discharge under section 1141(d)(3).  
27 The Discharge Memorandum urged the bankruptcy court to  
28 address the extent to which the confirmation order should  
discharge [debtor’s] debts. The memorandum cited the  
statutory criteria upon which the [creditors] relied in making  
their claim of nondischargeability, and it referenced specific

1 sections of the examiner’s report as support for their  
2 allegations that the criteria had been satisfied. It stated the  
3 [creditors’] claim for relief, in that it claimed that the  
confirmation order could not discharge [debtor’s] debts under  
the law.”

4 *Id.*

5 There the matter rested for several years, at least in the Ninth Circuit,  
6 until the Court revisited the issue in *In re Markus*, deciding, without oral  
7 argument, that the document in question *was not* a deficient complaint. In  
8 *Markus*, the creditor filed a “Motion to Object to Debtors [sic] discharge  
9 and Convert the Chapter 7 Case to Chapter 13” four days prior to the bar  
10 date. Subsequently, the creditor filed an adversary complaint which the  
11 court dismissed as time-barred. The BAP reversed the dismissal and  
12 remanded, holding that the “Motion to Object” was a deficiently pled  
13 complaint. The Ninth Circuit reversed, finding the case more similar to  
14 *Marino* than *Dominguez*. In so doing, the Court tightened up the rationale  
15 for its previous conclusion that the documents in *Dominguez* constituted a  
16 complaint.

17 In *Markus*, the Court said, the “Motion to Object” was “clearly  
18 aimed” at converting the debtor’s case from chapter 7 to 13 and the factual  
19 allegations all had to do with the debtor’s assets and her behavior after the  
20 state court litigation. In addition, the “Motion to Object” failed to identify  
21 any code section or criteria for nondischargeability. *In re Markus*, 313 F.3d  
22 at 1150. The main deficiency of the *Dominguez* document was its caption  
23 as a “Discharge Memorandum” rather than a complaint. In other respects it  
24 met the pleading requirements of Rule 8 in that it: 1) cited the statutory  
25 criteria for nondischargeability; 2) referenced specific evidence to support  
26 its allegations that the criteria for nondischargeability were satisfied; and, 3)  
27 stated a claim for relief by asserting that the confirmation order could not  
28 discharge the debtor’s debts. *Id.*

1           Thus, the Ninth Circuit has held that a document may be deemed a  
2 complaint despite being differently captioned. However, it is clear that the  
3 document must still meet the statutory requirements of a complaint:

- 4           1.     The main purpose of the document cannot be something other  
5                 than a direct challenge of the debtor’s right to a discharge;  
6                 and
- 6           2.     The document must cite the statutory criteria for  
7                 nondischargeability; and
- 8           3.     The document must reference specific evidence to support its  
9                 allegations that the criteria for nondischargeability are  
10                satisfied; and
- 10          4.     The document must state a claim for relief by asking the court  
                to deny the debtor’s discharge.

11           Turning now to the case at hand, the relevant pleading is titled  
12 “Notice of Motion and Motion for Relief from the Automatic Stay under 11  
13 U.S.C. Section 362; with Supporting Declaration of Jeffrey D. Bohn, Esq.”  
14 The Motion for Relief is clearly aimed at achieving relief from the  
15 automatic stay in order to proceed with the adjudication of the Plaintiff’s  
16 claims in the State Court Action. The Motion for Relief makes no request  
17 to have the dischargeability issue decided in the bankruptcy court, even  
18 though this court has exclusive jurisdiction to decide that issue.

19           The Motion for Relief does not cite any authority for excepting the  
20 Plaintiff’s Claim from discharge; the only authority the plaintiff cites is  
21 § 362(d)(1), which specifies “cause” for grounds for relief from the  
22 automatic stay. The Motion for Relief does not allege specific facts or  
23 make reference to evidence which would support a claim of  
24 nondischargeability: It merely recites in conclusory form that the claims are  
25 “nondischargeable in nature” and “can be most expeditiously resolved in  
26 the non-bankruptcy forum; and 3) the claims at issue (personal injuries to  
27 YENG YANG from battery committed by IA XIONG arise under non-  
28 bankruptcy law and can be most expeditiously resolved in the non-

1 bankruptcy forum.”

2 As in *Marino*, the Plaintiff did attach to her Motion for Relief a copy  
3 of the complaint filed in the State Court Action which does allege  
4 intentional infliction of emotional distress.<sup>4</sup> However, the pleading of  
5 various tort claims under state law does not automatically meet the “willful  
6 and malicious injury” requirements of a claim under § 523(a)(6).  
7 Negligence, which is also alleged in the State Court Action, does not rise to  
8 the level for nondischargeability. In *Marino*, the inclusion of the state court  
9 complaint did not transform the plaintiff’s “Opposition to Sale” into a  
10 defective complaint. Here, attaching the complaint filed in the State Court  
11 Action does not alter the character of the Motion for Relief. Finally, in the  
12 prayer to the Motion for Relief, the Plaintiff does not ask the court for a  
13 determination of nondischargeability, but for relief from the stay to allow  
14 the Plaintiff to “proceed under applicable non-bankruptcy law to enforce its  
15 remedies to proceed to final judgment in the non-bankruptcy forum.”

16 The court appreciates that the 60-day dischargeability bar date can  
17 potentially lead to a harsh result for creditors with bona-fide  
18 nondischargeability claims. However, the deadlines in the Rules strike a  
19 balance between the competing interest of the debtors who want a fresh  
20 start and the creditors who would like to receive payment of their claims.  
21 The relatively brief deadlines for objections relating to a debtor’s discharge  
22 are there to encourage expeditious administration of the case. The short  
23 deadlines “give debtors some degree of certainty in the process of obtaining  
24 a discharge.” *See In re Chamness*, 312 B.R. 421, 423 (Bankr. D.Colo.

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27 <sup>4</sup>The complaint filed in the State Court Action contained multiple  
28 plaintiffs and multiple claims. There is no explanation why the two minor  
plaintiffs in the complaint filed in the State Court Action were not included in the  
Complaint filed in the adversary proceeding.

1 2004). “A Chapter 7 bankruptcy discharge entitles a debtor to a ‘fresh  
2 start,’ therefore, the debtor has an interest in the prompt resolution of all  
3 discharge issues.” *In re Davis*, 195 B.R. 422, 424 (Bankr. W.D. Mo. 1996)  
4 (citation omitted).

5 **Conclusion.**

6 The court concludes that the Motion for Relief filed by the Plaintiff  
7 prior to the Bar Date more closely resembles the document filed in *Marino*,  
8 which failed to meet the requirements for a complaint. The Motion for  
9 Relief does not rise to the level of the document filed in *Dominguez* where  
10 the primary defect was the caption of the document and it does not  
11 substantially comply with the requirements of Rule 8. Therefore, the  
12 Motion for Relief does not satisfy the requirements for a “complaint.” The  
13 Complaint was filed after the Bar Date, no motion to extend the Bar Date  
14 was filed, and there is no “pleading” to which the Complaint can relate  
15 back. Therefore, the Motion to Dismiss will be granted. The adversary  
16 proceeding will be dismissed with prejudice.

17 Dated: September 14, 2011

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19  
20 /s/ W. Richard Lee  
21 W. Richard Lee  
22 United States Bankruptcy Judge  
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