UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: THURSDAY
DATE: MARCH 21, 2019
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. 18-13501-A-7 **IN RE: JUAN RAYGOZA-PEDROZA AND SYLVIA PORRAS-RAYGOZA**
18-1084

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-30-2018 [1]

MOORADIAN V. RAYGOZA-PEDROZA
ET AL
MELISSA MOORADIAN/ATTY. FOR PL.

No Ruling

2. 18-14207-A-7 **IN RE: ELMER/KATHLEEN FALK**
19-1009

STATUS CONFERENCE RE: COMPLAINT
1-14-2019 [1]

SANIEFAR V. FALK
MOZHGAN SANIEFAR/ATTY. FOR PL.

No Ruling

3. 18-14207-A-7 **IN RE: ELMER/KATHLEEN FALK**
19-1009 JRL-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
2-14-2019 [9]

SANIEFAR V. FALK
JERRY LOWE/ATTY. FOR MV.

Tentative Ruling

Motion: Motion to Dismiss
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part with leave to amend; denied in part
Order: Civil minute order

The defendant in this adversary proceeding, Elmer Falk ("Falk"), who is also the debtor in the underlying chapter 7 case, moves the court for dismissal of all seven causes of action against him in the subject complaint brought by the plaintiff, Fatemeh Saniefar ("Saniefar"). The claims in the complaint are for determining the dischargeability of debt under 11 U.S.C. §§ 523(a)(2) (fraud) and 523(a)(6) (willful and malicious injury), and for denial of discharge under 11 U.S.C. § 727(a)(2)(A), (B),(a)(3),(a)(4)(A),(a)(5) (bad acts). Saniefar opposes dismissal.

FACTS

The facts giving rise to this adversary proceeding, as pleaded in the complaint, are as follows. Saniefar complains that she and her business were sued twice over claims involving the Americans with Disabilities Act and related California law. ECF No. 1 ¶ 7, 10. The first lawsuit was filed in July 2014 in federal district court and was dismissed in or about March 2017 on a summary judgment motion by Saniefar. ECF No. 1 ¶ 10. The second lawsuit was filed in California state court in April 2017 and was dismissed on a summary judgment motion in or about July 2018. ECF No. 1 ¶ 10. The complaint contends that the two lawsuits were frivolous and vexatious as they were based on false assertions about Saniefar's disabilities and deficiencies in the required provisions for persons with disabilities in Saniefar's establishment. ECF No. 1 ¶ 9.

In July 2017, Saniefar initiated Racketeer Influenced and Corrupt Practices Act litigation against Falk and several other persons, including Ronald Moore, Tanya Moore, Kenneth Moore, Marejka Sacks, Zachary Best, Geoshua Levinson, Rick Moore, West Coast CASP and ADA Services, Ronny Loreto, Moore Law Firm, Mission Law Firm, and Does 1 through 100. Saniefar is seeking $2.1 million of damages in that litigation. ECF No. 1 ¶ 7.

The complaint alleges that the Moore Law Firm and the Mission Law Firm, through the related individuals named in the RICO action, including Falk, knowingly made false allegations in their ADA and related California law complaints, to collect quick settlements from businesses and individuals. ECF No. 1 ¶¶ 8, 12, 15. The Moore Law Firm, operated by Randy Moore and Tanya Moore, started these activities in 2009. ECF No. 1 ¶ 12.

Falk agreed to join in the practices of the Moore Law Firm and the Moores. ECF No. 1 ¶ 15. While not clear from the complaint when precisely this agreement took place, in conjunction with it, in or about November 2016 the assets and operations of the Moore Law Firm were transferred to a newly-created professional corporation, the Mission Law Firm, owned and operated by Falk. ECF No. 1 ¶¶ 14, 16, 17. The Mission Law Firm acquired the assets and operations of the Moore Law Firm for $3.7 million. ECF No. 1 ¶¶ 14, 21, Ex. 2. The purchase price was to be paid over the course of several years. ECF No. 1 ¶ 21.

The assets transferred included the first lawsuit against Saniefar. ECF No. 1 ¶ 18. After dismissal of the first lawsuit against Saniefar, the Mission Law Firm filed the second lawsuit against her.

Saniefar asserts that Falk knew or should have known that the allegations in the complaints against Saniefar were false due to evidence discovered in the course of the litigation against Saniefar. ECF No. 1 ¶¶ 16, 18. "Plaintiff is informed and believes, and thereon alleges, that Defendant Falk knows, or should have known in the exercise of reasonable care as a licensed attorney and owner and President of Mission Law Firm, that the ADA complaints filed by Mission Law Firm contained falsities regarding Ronald Moore's alleged disability, visit to establishments, encounter with

barriers, and intent to return so as to establish standing under the ADA and related state laws and that Defendant LeRoy Falk willfully disregarded his duties as an attorney and continued to maliciously cause damage to Saniefar by engaging in the fraudulent filing of ADA claims on behalf of Ronald Moore." ECF No. 1 ¶ 16.

Saniefar asserts that Falk was willfully ignorant of such discovered evidence in the continued prosecution of the first lawsuit and the filing and prosecution of the second lawsuit. ECF No. 1 ¶ 18.

According to Saniefar, the Mission Law Firm has filed approximately 500 cases and it has generated "millions of dollars" since its inception in November 2016. ECF No. 1 ¶¶ 23, 24.

According to statements made by Falk, on October 4, 2018 he and Tanya Moore rescinded the purchase agreement for the transfer of the assets and operations of the Moore Law Firm to the Mission Law Firm. Saniefar contends that the rescission amounted to a fraudulent conveyance, as Tanya Moore received no consideration. ECF No. 1 ¶ 25.

Falk filed the underlying chapter 7 bankruptcy case 12 days later, on October 16, 2018. ECF No. 1 ¶¶ 7, 25, 28, 31; Case No. 18-14207, ECF No. 1. Saniefar filed this adversary proceeding on January 14, 2019. ECF No. 1 at 1.

According to the complaint, Falk has been unresponsive in the underlying bankruptcy case to Saniefar's demand for information about the value of the Mission Law Firm's assets. Falk – while the sole owner and officer of the Mission Law Firm - has stated that he does not have any of the books or records or tax information for the Mission Law Firm. He has also stated that he does not know about the settlements facilitated by the Mission Law Firm and does not know what were the earnings or expenses of the Mission Law Firm during his ownership of it. ECF No. 1 ¶ 26. Falk has stated that Tanya Moore would have the above information about the Mission Law Firm. ECF No. 1 ¶ 27.

The complaint alleges that Falk has also denied knowing that upon the rescission of the purchase agreement involving the Moore Law Firm and the Mission Law Firm, the Mission Law Firm had several outstanding ADA and Proposition 65 cases, with attorney's fees and costs receivables, which were collected upon by Tanya Moore after Falk filed the underlying bankruptcy case. ECF No. 1 ¶¶ 28, 29, 30.

Saniefar disputes in the complaint Falk's denial of having information about the Mission Law Firm, given his sole ownership and operation of the law firm for nearly two years. ECF No. 1 ¶ 31.

In the complaint, Saniefar questions that the rescission of the purchase agreement involving the Moore Law Firm and the Mission Law Firm took place pre-petition, as the dissolution papers for the Mission Law Firm were not filed with the California Secretary of State until November 8, 2018, after Falk filed his bankruptcy case. ECF No. 1 ¶ 31.

Saniefar also disputes in the complaint the veracity of Falk's schedules in the bankruptcy case, for his failure to include information in them about the value of the Mission Law Firm and about the claimed pre-petition rescission of the purchase agreement involving the two law firms. ECF No. 1 ¶ 32.

PROCEDURE

Saniefar filed an adversary proceeding to except from discharge any debt due her, 11 U.S.C. §§ 523(a)(2) (fraud), 523(a)(6) (willful and malicious injury, and to deny discharge, 11 U.S.C. § 727(a)(2)(A), (B),(a)(3),(a)(4)(A),(a)(5) (bad acts).

Falk moves under Rule 12(b)(6) to dismiss the complaint arguing the insufficiency of the complaint under Rule 8, as construed by the Supreme Court's decision in *Iqbal* and *Twombly*. Saniefar opposes the motion, augmenting the record with declaration by her counsel (Moji Saniefar) and exhibits and requests for judicial notice.

LAW

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "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." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In ruling on a Rule 12(b)(6) motion, the court may also consider some information beyond the four corners of the complaint, without converting the motion into a motion for summary judgment under Rule 56.

Under Fed. R. Civ. P. 10(c), as made applicable here by Fed. R. Bankr. P. 7010, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading *for all purposes*." This includes exhibits to complaints challenged under Rule 12(b)(6). "We generally consider exhibits attached to a complaint and incorporated by reference to be part of the complaint." *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 964 n.6 (9th Cir. 2014) (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.2007)).

In some circumstances, courts may also consider documents beyond attachments to the complaint.

> Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003). A court may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Warren*, 328 F.3d at 1141 n.5, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 n.3 (2d Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); *see also Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 n.2 (9th Cir. 2007).

DISCUSSION

Information and Evidence in Support of Motion and Opposition to Motion (Declarations/Requests for Judicial Notice/Exhibits)

Considering Information Beyond the Complaint on a Rule 12(b)(6) Motion

The complaint attaches two exhibits. Exhibit 1 is Saniefar's RICO litigation complaint (along with its own exhibits) and Exhibit 2 is a September 2017 declaration by Falk in what appears to be unrelated litigation. The RICO complaint is incorporated by reference into the subject complaint. ECF No. 1 ¶ 7. Falk's Exhibit 2 declaration is both referenced and quoted in the complaint. ECF No. 1 ¶ 17.

As the RICO complaint is incorporated by reference into the complaint, it can be considered by the court in ruling on this motion. The court may consider Falk's Exhibit 2 declaration as well, given that it is attached, referenced and the thrust of the declaration is quoted in the instant complaint.

Beyond the Exhibit 1 and Exhibit 2 attached to the complaint, the court is unwilling to consider other information to resolve this motion.

Saniefar's exhibits (ECF Nos. 17 & 18), submitted in connection with the opposition to this motion, are not central to the claims in the complaint because they are merely evidentiary in nature, supporting existing allegations in the complaint. The job of this court on a Rule 12(b)(6) motion is not to evaluate evidence. It is to take the allegations in the complaint as true, and determine whether they state claims upon which relief can be granted.

The exhibits consist, for instance, of a list of cases filed by the Mission Law Firm, Proposition 65 notices filed with the California Attorney General, documents and pleadings and notices from Falk's bankruptcy case, transcription of statements by Falk at his meeting of creditors, the certificate of dissolution for the Mission Law Firm, amendment to the articles of incorporation of the Moore Law Firm, post-petition consent judgments reflecting settlements in cases involving the Mission Law Firm, and pleadings and court orders in the RICO action showing that it is still pending. ECF Nos. 17, 18.

The thrust of the allegations behind each of the exhibits is in the narrative of the complaint. For instance, the complaint references many statements Falk made at the meeting of creditors. The complaint also outlines at length the information missing from Falk's bankruptcy documents. As such, the exhibits themselves are not *documents* central to the claims in the complaint.

Next, the declaration of Saniefar's counsel, Moji Saniefar, is not a document, much less a document central to the claims in the complaint. Her declaration merely informs the court that the RICO action is now in discovery and that the prosecution of the action with respect to Falk has been stayed, given his bankruptcy filing. ECF No. 16. Thus, the court cannot consider her declaration in resolving this motion.

The same is true with respect to Falk's declaration in support of the motion. ECF No. 12. He merely informs the court that he is doing his best at complying with the bankruptcy trustee's document production requests, stating that whatever documents he does not have are in the possession of Tanya Moore. ECF No. 12 at 2. The court cannot consider his declaration in resolving this motion either.

No Admissibility of Evidence Because No Conversion into Motion for Summary Judgment

"If, 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).

Both Saniefar and Falk have proffered evidence in support of the motion and opposition to the motion. *See* ECF Nos. 12, 16, 17, 18.

However, such evidence will not be admitted here as the court is not willing to convert this Rule 12(b)(6) motion into a summary judgment motion. There has been no answer filed to the complaint and there has been no discovery conducted yet. To transform this motion into one for summary judgment would be premature and prejudicial to both parties.

Even if summary judgment adjudication was not premature, courts are hesitant to consider summary judgment on issues involving motive or intent - including 11 U.S.C. §§ 523(a)(2), 523(a)(6), 727(a)(2)(A), 727(a)(2)(B), 727(a)(3), 727(a)(4)(A) claims - as such issues are provable only by circumstantial evidence. *See*, *e.g.*, *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *see also Maffei v. N. Ins. Co. of New York*, 12 F.3d 892, 898 (9th Cir. 1993); *Morgan Creek Prods., Inc. v. Franchise Pictures LLC (In re Franchise Pictures LLC)*, 389 B.R. 131, 144-45 (Bankr. C.D. Cal. 2008).

Accordingly, the court will not consider any of the evidence submitted in support of the motion or opposition to the motion. The court's ruling will be limited to the complaint and attachments to the complaint.

First Cause of Action: 11 U.S.C. § 523(a)(2)(A)

Section § 523(a)(2) offers creditors a narrow exception to the rule that debtors otherwise eligible for discharge are forgiven unsecured debts in chapter 7.

Law of fraud

Most fraud claims must be pleaded with particularity. Fed. R. Civ. P. 9(b). *See, e.g.*, *Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R. 257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that the defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff must include the "who, what, when, where, and how" of the fraud. *Id.* Generally, Rule 9(b) applies to § 523(a)(2) actions. *In re Craciun*, 2014 WL 2211742 (9th Cir. BAP May 28, 2014). And in the context of § 523(a)(2)(A) it also applies to actual fraudulent transfers. *Takiguchi v. MRI Int'l, Inc.*, 2015 WL

1609828, at *2 (D. Nev. Apr. 10, 2015). But it does not apply to constructively fraudulent transfers. *Id.*

Assuming the aggrieved creditors survives the pleading stage proving fraud requires: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

Federal Rule of Civil Procedure 10(b)

Aggregating claims for relief is presumptively proper. "A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. **If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.**" Fed. R. Civ. P. 10(b), incorporated by Fed. R. Bankr. P. 7010.

Here, the complaint alleges two different species of fraud: (1) factual misrepresentations made in the prosecution of "frivolous and vexatious" Americans with Disabilities Act claims; and (2) fraudulent transfer of the Mission Law Firm assets back to the Moore Law Firm. ECF No. 1 ¶¶ 14, 21, 25, 33.

On the merits

Aside from the failure to plead with particularity, Saniefer has not pleaded a cause of action for nondischargeable fraud. As to the first theory, *i.e.*, common law fraud, Saniefer has not, and probably cannot, plead reliance, justifiable or otherwise. *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d at 1085. The crux of the complaint is that Falk knowingly used false factual allegations to prosecute two Americans With Disabilities Act actions against Saniefar. Reliance, as that word is used in *Turtle Rock Meadows*, suggests a voluntary change of position on Saniefer's part. This is not what occurred here, according to the complaint. Hence, the first theory does not support a claim for nondischargeable fraud.

Further, the complaint does not sufficiently plead the asserted misrepresentations. It was Ronald Moore, as plaintiff, who asserted the alleged falsities in the lawsuits against Saniefar. The falsities become Falk's – and become his misrepresentations – only if he knew about them. However, the complaint does not say that he knew about them. The complaint is not certain that Falk knew about the falsities. The complaint says that Falk knew or **should have known** about the falsities. ECF No. 1 ¶¶ 16, 18. If Falk did not

know about the falsities, they could not have been his misrepresentations. The complaint does not sufficiently plead misrepresentation.

As to the second theory, *i.e.*, fraudulent transfer, it is the Moore Law Firm, and not Falk, whose discharge might be denied under § 523(a)(2)(A). *See* 11 U.S.C. § 727(a)(1) (otherwise refusing corporations a discharge in chapter 7). Section 523 requires that the debt be "for money, property, services, or . . . credit obtained by . . . actual fraud." 11 U.S.C. § 523(a)(2)(A); *Husky Int'l Electronics v. Ritz*, 136 S.Ct. 1581, 1589 (2016) (holding that § 523(a)(2)(A) may deny discharge to the recipient of fraudulently transferred assets if the recipient files bankruptcy). As the Supreme Court described it:

> **It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the recipient of the transfer—who, with the requisite intent, also commits fraud—can "obtai[n]" assets "by" his or her participation in the fraud.** See, e.g., *McClellan v. Cantrell*, 217 F.3d 890 (C.A.7 2000); see also supra, at 1587 – 1588. **If that recipient later files for bankruptcy, any debts "traceable to" the fraudulent conveyance,** see *Field*, 516 U.S., at 61, 116 S.Ct. 437; post, at 1591, **will be nondischargable under § 523(a)(2)(A).** Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be nondischargeable under § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be) a debtor on the verge of bankruptcy,3 but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.

Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. at 1589 (emphasis added).

Here, Falk is neither the transferor, nor the transferee, of the assets. The complaint alleges that the Moore Law Firm transferred the "assets and operations" to the Mission Law Firm and that those assets were later transferred back. ECF No. 1 ¶¶ 14, 25. Falk was alleged to be the sole owner and an attorney employed by the Mission Law Firm and, as a consequence, does not fall within the *Husky Int'l* rubric. As a consequence, the fraudulent transfer of assets will not support an action under § 523(a)(2)(A).

For each of these reasons, the motion will be granted with leave to amend as to the first cause of action.

Second Cause of Action: 11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The "malicious" injury requirement is separate from the "willful" injury requirement. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008).

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." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997)).

A "willful" injury is a "deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphases in original). This willful injury requirement is satisfied "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." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142, 1144–45 (9th Cir. 2002). By contrast, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64.

Thus, the standard is a subjective one, where the debtor must have "either a *subjective intent* to harm, or a *subjective belief [or actual knowledge]* that harm is substantially certain." *Su*, 290 F.3d at 1444 (emphases added). In determining whether the debtor has actual knowledge, the court can infer that the debtor is usually "charged with the knowledge of the natural consequences of his actions." *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). "In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6.

Wrongfully pursued litigation may lead to liability under section 523(a)(6) for a debtor. *Hughes v. Arnold (In re Hughes)*, 347 F. App'x 359, 361 (9th Cir. 2009) (applying issue preclusion to state court's award of attorney's fees against an attorney whose conduct was determined to be unreasonable, frivolous, meritless, or vexatious);
Papadakis v. Zelis (In re Zelis), 66 F.3d 205, 209 (9th Cir. 1995) (applying issue preclusion to a state court's award of sanctions against a debtor who had been filing frivolous appeals).

> Courts regularly find that the conduct which generated an award of counsel fees for malicious prosecution or similar claims, such as frivolous litigation in a state court action, states a plausible claim for relief under 11 U.S.C. § 523(a)(6). The court in *In re Schermer*, 388 B.R. 123, 129 (Bankr.E.D.Pa.2008), relying on *In re Conte*, 33 F.3d at 307, held that the state judge's findings concerning the debtor-attorney's vexatious conduct during litigation stated a basis for relief under § 523(a)(6) and survived the debtor's Rule 12(b)(6) motion. *Accord In re Conner*, 302 B.R. 509, 515 (Bankr.W.D.Pa.2003) (a prepetition award of attorney's fees under the Pennsylvania statute warranted summary judgment on a § 523(a)(6) complaint). And see *In re Wilson*, 116 F.3d 87, 89–90 (3d Cir.1997) (any judgment

> which might flow from the creditor's civil complaint for malicious prosecution would meet the standards for exception to discharge under 11 U.S.C. § 523(a)(6)).

Steinhardt Mgmt. v. Bohn (In re Bohn), Case No. 13-35854 (RG), 2015 WL 2415412, at *7 (Bankr. D.N.J., May 19, 2015).

As it pertains to the "willful" requirement, the complaint is insufficient on how or why Falk had the subjective intent to harm Saniefar or had the subjective belief or actual knowledge that harm to Saniefar was substantially certain. The complaint does not contain facts satisfying this element of section 523(a)(6).

Saniefar's harm, if any, resulted from the prosecution of false allegations. For the "willful" element to be satisfied, Falk would have had at a minimum to actually know that he was prosecuting complaints with false allegations against Saniefar. The complaint here does not say unequivocally that Falk knew of the alleged falsities in the lawsuits.

Conversely, the complaint is uncertain that Falk actually knew of the existence of false allegations in the lawsuits. The complaint asserts that Falk "should have known" of the false allegations, clearly implying that he may not have actually known of them. ECF No. 1 ¶¶ 16, 18. "Plaintiff is informed and believes, and thereon alleges, that **Defendant Falk knows, or should have known** in the exercise of reasonable care as a licensed attorney and owner and President of Mission Law Firm, that the ADA complaints filed by Mission Law Firm contained falsities." ECF No. 1 ¶ 16 (emphasis added). "Plaintiff is informed and believes, and thereon alleges, **that Defendant Falk knew, or** in the exercise of reasonable care as a practicing and licensed attorney and President of Mission Law Firm, **should have known**, that the verified complaints and sworn testimony of Ronald Moore that Mission Law Firm continued to offer and argue in prosecution of Ronald Moore's ADA action against Plaintiff in the ADA litigations were false." ECF No. 1 ¶ 18 (emphasis added).

An allegation that Falk "should have known" of the falsities in the lawsuits, by exercising reasonably care, does not satisfy the willful requirement of section 523(a)(6). The allegation makes it clear that Falk may not have known of the falsities in the lawsuits. If Falk did not actually know of the falsities – especially if there were other attorneys from the Mission Law Firm working on the lawsuits, which the complaint does not address either – he could not have intended the harm sustained by Saniefar or had knowledge to a substantial certainty that Saniefar would sustain the harm.

Therefore, the court is unable to draw a reasonable inference of liability under section 523(a)(6) from the alleged facts. As such, the court will grant the motion with respect to the section 523(a)(6) claim, dismissing it with leave to amend.

For each of these reasons the motion will be granted with leave to amend as to the second cause of action.

Third Cause of Action: 11 U.S.C. § 727(a)(2)(A)

11 U.S.C. § 727(a)(2)(A) provides that "(a) The court shall grant the debtor a discharge, unless— (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed— (A) property of the debtor, within one year before the date of the filing of the petition."

An objection to discharge under § 727(a)(2)(A) requires the plaintiff to prove that (1) a disposition of property, such as a transfer or concealment, occurred and (2) the debtor had the subjective intent to hinder, delay, or defraud a creditor through the act of disposing of the property. *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997). Both elements must have taken place within the one-year period prior to the petition date. *Id.* The debtor's intent does not need to be fraudulent; it is sufficient that the debtor's intent is only to hinder or delay a creditor. *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996). Further, "lack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy." *Id.* at 1281–82 (citing *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1343 (9th Cir. 1986)).

In this cause of action, Saniefar complains that Falk has:

(1) not provided the books and records of the Mission Law Firm;

(2) hindered the administration of his chapter 7 bankruptcy estate by transferring his largest asset, the Mission Law Firm, to Tanya Moore, a friend and creditor;

(3) failed to disclose the valuation of the Mission Law Firm in his bankruptcy petition documents; and

(4) failed to disclose the transfer of the Mission Law Firm's assets just 12 days pre-petition.

ECF No. 1 ¶¶ 49-52.

Saniefar's allegations are about the Mission Law Firm and not about Falk. According to the complaint, the books and records at issue are those of the Mission Law Firm, the assets transferred were those of the Mission Law Firm, the valuation in question is that of assets of the Mission Law Firm. None of these were of Falk. The complaint attributes assets and actions of the Mission Law Firm to Falk. But, the court cannot disregard the corporate identity of the Mission Law Firm by imputing its assets and actions on Falk. The allegations in the complaint are not sufficient to state a claim for denial of discharge relief against Falk. The court is unable to draw a reasonable inference of liability on the part of Falk from those allegations.

For each of these reasons the motion will be granted with leave to amend as to the third cause of action.

Fourth Cause of Action: 11 U.S.C. § 727(a)(2)(B)

11 U.S.C. § 727(a)(2)(B) provides that "(a) The court shall grant the debtor a discharge, unless— (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed— (B) property of the estate, after the date of the filing of the petition."

"A plaintiff must prove four elements under this provision: '(1) the debtor transferred, removed, destroyed, mutilated or concealed property; (2) belonging to the estate; (3) post-petition; (4) intending to hinder, delay or defraud a creditor or officer of the estate.'"

Reperex, Inc. v. May (In re May), 579 B.R. 568, 596 (Bankr. D. Utah 2017); *see also Davis v. Choy (In re Choy)*, 569 B.R. 169, 181 (Bankr. N.D. Cal. 2017).

In this cause of action, Saniefar complains that Falk has:

(1) not provided the books and records of the Mission Law Firm;

(2) hindered the administration of his chapter 7 bankruptcy estate by transferring his largest asset, the Mission Law Firm, to Tanya Moore, a friend and creditor;

(3) failed to disclose the valuation of the Mission Law Firm in his bankruptcy petition documents;

(4) failed to disclose the transfer of the Mission Law Firm's assets just 12 days pre-petition; and

(5) the transfer of the Mission Law Firm's assets resulted in the estate losing the post-petition collection of receivables on cases the Mission Law Firm was prosecuting prior to transferring its assets immediately pre-petition.

ECF No. 1 ¶¶ 56-59.

Saniefar's allegations are about the Mission Law Firm and not about Falk or the estate. According to the complaint, the books and records at issue are those of the Mission Law Firm, the assets transferred were those of the Mission Law Firm, the valuation in question is that of assets of the Mission Law Firm, the assets the estate lost were those of the Mission Law Firm. Yet, it is Falk that is in bankruptcy. The Mission Law Firm is not the bankrupt debtor.

The complaint attributes assets and actions of the Mission Law Firm to Falk or the bankruptcy estate. But, the court cannot disregard

the corporate identity of the Mission Law Firm by imputing its assets and actions on Falk or the estate. The allegations in the complaint are not sufficient to state a claim for denial of discharge relief against Falk. The court is unable to draw a reasonable inference of liability on the part of Falk from those allegations.

For each of these reasons the motion will be granted with leave to amend as to the fourth cause of action.

Fifth Cause of Action: 11 U.S.C. § 727(a)(3)

11 U.S.C. § 727(a)(3) provides that "(a) The court shall grant the debtor a discharge, unless— (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case."

An objection to discharge under § 727(a)(3) requires the plaintiff to prove that (1) the debtor failed to maintain and preserve adequate records, and (2) that failure makes it impossible to ascertain the debtor's financial condition and material business transactions. *Landsdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994). This subsection does not require absolute completeness in making or keeping records. *Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 761 (9th Cir. 2008) (citing *Rhoades v. Wikle*, 453 F.2d 51, 53 (9th Cir. 1971)).

Instead, the debtor must "present sufficient written evidence which will enable his creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." *Id.* Thus, § 727(a)(3) imposes an affirmative duty on the debtor to create books and records that accurately document his business affairs. *Id.* at 762. The debtor must either produce such records as are customarily kept by a person doing the same kind of business, or provide adequate reasons why he was not duty bound to keep such records. *Id.* at 763. The Ninth Circuit has held that "when a debtor transfers a substantial amount of money to a third party, the failure to keep any documentation evidencing the terms of the transfer or the fact that the payment actually took place establishes a prima facie violation of [§ 727(a)(3)]." *Id.* at 762.

Records that may be relevant in an adversary proceeding where a creditor objects to dischargeability of a debt are not necessarily records from which the debtor's current financial condition may be ascertained. "[Section] 727(a)(3) is aimed at the preservation of records for the purpose of ascertaining a debtor's current financial condition, not evidence that may be relevant to an adversary proceeding where a creditor objects to the discharge of a debt." *Wachtel ex rel. Estate of Wolfert v. Rich (In re Rich)*, 353 B.R. 796, 812 (Bankr. S.D.N.Y. 2006).

Further, the distinction between a debtor's personal financial records and the records of a third-party, including a corporation of the debtor, is an important distinction for purposes of section 727(a)(3) liability.

> Even if the Court finds that the Debtors did not produce records documenting all machinery and equipment previously used by Tool Masters, the Debtors' failure to produce records from their former corporation is not sufficient to deny the Debtors a discharge under § 727(a)(3), as such objection necessarily must be based on the Debtors' failure to produce books and records which depict their personal finances, not that of their corporation. *Phillips v. Nipper (In re Nipper)*, 186 B.R. 284, 289 (Bankr.M.D.Fla.1995). **A debtor's corporation will generally be treated as an entity separate and distinct from the individual debtor.** *Id.* In certain cases, however, the books and records of a debtor's corporation are relevant in ascertaining an individual debtor's financial status if they accurately portray that debtor's personal finances. *See In re Martin*, 554 F.2d 55, 58 (2d Cir.1977).

Buckeye Retirement Co., L.L.C. v. Howells, Jr. (In re Howells), 365 B.R. 764, 769 (Bankr. N.D. Ohio 2007) (emphasis added).

> The terms of 11 U.S.C. § 727(a)(3) do not condition a debtor's discharge on the presentation of the documents that he did keep and preserve. Rather, the statute imposes an affirmative duty on the debtor to keep and preserve recorded information that will allow his creditors to ascertain his financial condition and business transactions.

Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva), 550 F.3d 755, 764 (9th Cir. 2008).

In other words, "**the key inquiry is whether the records produced are sufficient to enable one to ascertain [the debtor's] financial condition**." *Steffensen v. Hunt (In re Steffensen)*, 567 B.R. 188, 200 (D. Utah 2016) (emphasis added).

In this cause of action, Saniefar complains that Falk has:

(1) not provided the books and records of the Mission Law Firm;

(2) stated under oath that he does not know anything about the earnings, expenses, revenues, or settlement proceeds of the Mission Law Firm; and

(3) stated that he does not know how many cases have settled and how much compensation has been paid to the Mission Law Firm post-petition.

ECF No. 1 ¶¶ 63-65.

The books and records, earnings, expenses, revenues, settlement proceeds, and revenue-generating legal cases at issue in this cause of action are those of the Mission Law Firm, a corporation with a

separate and distinct legal status and identity from Falk. As already discussed above, it is Falk, and not the Mission Law Firm, that is in bankruptcy. The Mission Law Firm is not the bankrupt debtor.

Nor does the complaint say how or why the Mission Law Firm's financial records are relevant to ascertaining Falk's financial condition or business transactions to which Falk was a party. On this complaint, the court is unable to draw a reasonable inference of liability under section 727(a)(3) for Falk's failure to produce the financial records of a third-party corporation.

For each of these reasons the motion will be granted with leave to amend as to the fifth cause of action.

Sixth Cause of Action: 11 U.S.C. § 727(a)(4)(A)

11 U.S.C. § 727(a)(4)(A) provides that "(a) The court shall grant the debtor a discharge, unless— (4) the debtor knowingly and fraudulently, in or in connection with the case-- (A) made a false oath or account."

An objection to discharge under § 727(a)(4)(A) requires the plaintiff to prove that (1) the debtor made a false oath (or account) in connection with his own bankruptcy case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010). As to the first element, "[a] false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath." *Id.* As to the second element, a fact is material "if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." *Id.* at 1198.

In this cause of action, Saniefar complains that Falk has:

(1) falsely stated under oath that he does not know about the Mission Law Firm's operations and earning, although he was the only officer and owner of the law firm since November 2016;

(2) falsely stated under oath that he executed dissolution papers for the Mission Law Firm pre-petition, on October 4, 2018, when the papers were not filed with the California Secretary of State until post-petition, on November 8, 2018; and

(3) falsely stated under oath in his bankruptcy petition documents that the schedules submitted with the court were truthful, while he failed to include information: about the assets the Mission Law Firm had; that he paid $3.7 million for the assets; and that he transferred the assets and the firm to Tanya Moore just 12 days pre-petition.

ECF No. 1 ¶¶ 69-71.

The complaint plainly questions the veracity of Falk's:

(a) denials at a meeting of creditors of knowledge about the Mission Law Firm's operations and earnings, given that Falk was the sole owner and operator of the Mission Law Firm for approximately two years, between about November 2016 and October 2018;

(b) representations that he dissolved the Mission Law Firm before his filing of the bankruptcy petition on October 16, 2018, when the dissolution certificate for the Mission Law Firm was filed with the California Secretary of State post-petition, on or about November 8, 2018;

(c) oath in executing his bankruptcy schedules, given his failure to disclose information about what were the Mission Law Firm's assets, how much he acquired the Mission Law Firm for, and that he transferred the assets of the Mission Law Firm only 12 days pre-petition.

The foregoing alleged misrepresentations or lack of required disclosures pertain to the value of Falk's assets, and hence the assets of the bankruptcy estate – namely, Falk's ownership interest in and value of the Mission Law Firm. The failure to disclose information about the Mission Law Firm's assets, the initial purchase of the assets, and/or the transfer of the assets just prior to filing for bankruptcy, was on Falk's bankruptcy schedules and/or statements. The remaining representations involving an alleged false oath were at a meeting of creditors. *See*, *e.g.*, ECF No. 1 ¶¶ 25, 26.

From the inconsistencies pertaining to Falk's knowledge about the Mission Law Firm, its assets, transfers of the assets, and dissolution, the court is able to draw a reasonable inference of liability under section 727(a)(4)(A) on the part of Falk. The materiality of the contradictions rise to the level of stating a claim for relief under section 727(a)(4)(A).

For each of these reasons the motion will be denied as to the sixth cause of action.

Seventh Cause of Action: 11 U.S.C. § 727(a)(5)

11 U.S.C. § 727(a)(5) provides that "(a) The court shall grant the debtor a discharge, unless— (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

Section 727(a)(5) provides for denial of discharge "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). "Under § 727(a)(5) an objecting party bears the initial burden of proof and must demonstrate: (1) debtor at one time, not too remote

from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets." *In re Retz*, 606 F.3d 1189, 1205 (9th Cir. 2010) (quoting *Olympic Coast Invest., Inc. v. Wright (In re Wright),* 364 B.R. 51, 79 (Bankr. D. Mont. 2007)).

In this cause of action, Saniefar complains that Falk has:

(1) not provided the books and records of the Mission Law Firm;

(2) hindered the administration of his chapter 7 bankruptcy estate by transferring his largest asset, the Mission Law Firm, to Tanya Moore, a friend and creditor;

(3) failed to disclose the valuation of the Mission Law Firm in his bankruptcy petition documents;

(4) failed to disclose the transfer of the Mission Law Firm's assets just 12 days pre-petition; and

(5) the transfer of the Mission Law Firm's assets resulted in the estate losing the post-petition collection of receivables on cases the Mission Law Firm was prosecuting prior to transferring its assets immediately pre-petition.

ECF No. 1 ¶¶ 75-78.

As outlined in the discussions on the section 727(a)(2)(A), (a)(2)(B), and (a)(3) claims, the books and records, assets, valuation of assets, and transfer of assets at issue are those of the Mission Law Firm. But, it is Falk, and not the Mission Law Firm, that is in bankruptcy. The complaint disregards the corporate identity of the Mission Law Firm and does not state how or why its financial records are relevant to ascertaining the loss or deficiency in any of Falk's assets.

The complaint does not refer to the actual assets of Falk, although it references the assets of the Mission Law Firm as assets of Falk. While Falk may have owned the equity in the Mission Law Firm, he did not own the assets of the Mission Law Firm. The complaint does not even state any loss or deficiency in an asset of Falk. *See* ECF No. 1 ¶¶ 75-78. The references to assets in the complaint are those of the Mission Law Firm. On this complaint, then, the court is unable to draw a reasonable inference of liability under section 727(a)(5) for Falk's failure to provide information about the Mission Law Firm's assets.

For each of these reasons the motion will be granted with leave to amend as to the seventh cause of action.

RULES VIOLATIONS

Though not a basis for this ruling, the court notes that the complaint has significant violations of the Federal Rules of Bankruptcy Procedure and the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California.

Federal Rule of Bankruptcy Practice 7008

Rule 7008 provides:

> Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. **In an adversary proceeding before a bankruptcy court, the complaint,** counterclaim, cross-claim, or third-party complaint **shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.**

Fed. R. Bankr. P. 7008 (emphasis added).

Here, the complaint pleads that the matters now before this court are core. Complaint ¶ 4. Prior to December 1, 2016, Rule 7008 did require Saniefar to affirmatively plead whether the matter is core or non-core. Subsequent to December 1, 2016, Rule 7008 contains no such requirement. But it does require Saniefar to plead whether she consents or does not consent to final orders and judgments by this court. *Id.* The complaint contains no such statement.

LBR 9004-2

The complaint also contains three violations of applicable local rules with respect to the exhibits appended to the complaint.

First, exhibits must be filed separately. LBR 9004-2 provides:

> Separate Exhibit Document(s). **Exhibits shall be filed as a separate document from the document to which it relates** and identify the document to which it relates (such as "Exhibits to Declaration of Tom Swift in Support of Motion For Relief From Stay"). A separate exhibit document may be filed with the exhibits which relate to another document, or all of the exhibits may be filed in one document, which shall be identified as "Exhibits to Motion/Application/Opposition/…]."

LBR 9004-2(d)(1) (emphasis original and added).

Here, the exhibits offered in support of the complaint are appended to it.

Second, no exhibit index was provided. LBR 9004-2 provides:

> Exhibit Index. **Each exhibit document filed shall have an index at the start of the document that lists and identifies by exhibit number/letter each exhibit individually and shall state the page number at which it is found within the exhibit document.**

LBR 9004-2(d)(2) (emphasis original and added).

No such index was provided.

Third, the exhibits are not consecutively numbered. LBR 9004-2 provides:

> Numbering of Pages. **The exhibit document pages,** including the index page, and any separator, cover, or divider sheets, **shall be consecutively numbered** and shall state the exhibit number/letter on the first page of each exhibit.

LBR 9004-2(d)(3) (emphasis original and added).

The exhibits appended to the complaint were not consecutively numbered.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The defendant Elmer Leroy Falk's motion has been presented to the court. Having considered the well-pleaded facts of the complaint, motion to dismiss, opposition and reply thereto,

Motion to Dismiss Granted in Part, Denied in Part

IT IS ORDERED that the motion is granted in part with leave to amend and denied in part. Dismissal is granted with leave to amend as to causes of action one, two, three, four, five and seven. Dismissal is denied as to cause of action six.

If the Plaintiff files a First Amended Complaint

IT IS FURTHER ORDERED that the plaintiff Fatemeh Saniefar may file and serve a First Amended Complaint no later than April 11, 2019. Any amended complaint shall address the issues raised by the court in this ruling that are applicable to the claims in the amended complaint and be accompanied by a redline copy showing all amendments, modifications and/or deletions.

IT IS FURTHER ORDERED that the First Amended Complaint shall file each claim founded on a separate transaction or occurrence in separate counts, Fed. R. Civ. P. 10(b), *incorporated by* Fed. R. Bankr. P. 7010.

IT IS FURTHER ORDERED that defendant Falk may file an answer or another appropriate response to the amended complaint no later than May 8, 2019.

IT IS FURTHER ORDERED that if the defendant Falk files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on June 12, 2019.

IT IS FURTHER ORDERED that the parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence. In the event that the defendant Falk fails to file an answer or motion within the time specified in this order, the plaintiff Saniefar shall forthwith and without delay seek the entry of the defendant's default.

If the Plaintiff does not file a First Amended Complaint

IT IS FURTHER ORDERED that if plaintiff Fatemeh Saniefar does not file a First Amended Complaint on or before April 11, 2019, defendant Falk shall file an answer to the original complaint no later than May 8, 2019.

IT IS FURTHER ORDERED that the parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence. In the event that the defendant Falk fails to file an answer within the time specified in this order, the plaintiff Saniefar shall forthwith and without delay seek the entry of the defendant's default.

Without Regard to Whether the Complaint is Amended

IT IS FURTHER ORDERED that the plaintiff Saniefar shall comply with all applicable Federal Rules of Bankruptcy Procedure and local rules. Failure to comply with the terms of this order or applicable rules may result in sanctions, including, without limitations, the sua sponte dismissal of the amended complaint.

4. 18-13412-A-7 **IN RE: KIRANDEEP CHIMA**
18-1063 MWQ-1

MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-8-2019 [27]

CHIMA V. CHIMA
MATTHEW QUALL/ATTY. FOR MV.

Final Ruling

Motion: Entry of Default Judgment Determining Pre-Petition Debt Non-Dischargeable under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4) (embezzlement), and/or 523(a)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Continued

The hearing on this motion will be continued to April 24, 2019 at 10:00 a.m., in order for the plaintiff to file a declaration by the person who translated the plaintiff's declaration in support of this motion. The plaintiff's declaration in support of this motion says that her daughter translated the declaration in Punjabi for her. ECF No. 30 at 11. Yet, there is no declaration in the record from her daughter, establishing her qualifications to translate for the plaintiff, what she did, and why she did it, among other things. Accordingly, the hearing on the motion will be continued to April 24, 2019 at 10:00 a.m. The plaintiff shall file the declaration with the court no later than April 10, 2019. In the event the declaration is filed, the court is inclined to grant the motion pursuant to the following ruling.

Final Ruling

Motion: Entry of Default Judgment Determining Pre-Petition Debt Non-Dischargeable Under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4) (embezzlement), and/or 523(a)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by the moving party

The clerk has entered a default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055.

Fed. R. Civ. P. 55(b)(2) provides that:

"A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals —

preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:
(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

The factors courts consider in determining whether to enter a default judgment include: (i) the possibility of prejudice to the plaintiff, (ii) the merits of the plaintiff's substantive claim, (iii) the sufficiency of the complaint, (iv) the amount at stake, (v) the possibility of a dispute over material facts, (vi) whether the default was due to excusable neglect, and (vii) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

The plaintiff has requested that the court enter default judgment against the defendant on the claims brought in this action. Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court will grant the motion and enter default judgment for the plaintiff on the claims brought against defendant in this adversary proceeding.

The court has the authority to declare pre-petition debts non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), 523(a)(6).

11 U.S.C. § 523(a)(2)(A)

To succeed on a nondischargeability claim under § 523(a)(2)(A), a creditor must establish five elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

11 U.S.C. § 523(a)(4), Embezzlement

"Federal law and not state law controls the definition of embezzlement for purposes of § 523(a)(4)." *First Del. Life Ins. Co. v. Wada (In re Wada)*, 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997). "Embezzlement is defined as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Id.* (quoting *Moore v. United States*, 160 U.S. 268, 269 (1895)) (internal quotation marks omitted). A debt can be nondischargeable for embezzlement under § 523(a)(4) even without the existence of a fiduciary relationship. *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551,

555 (9th Cir. 1991). "Embezzlement, thus, requires three elements: (1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which it was entrusted; and (3) circumstances indicating fraud." *Id.* (alteration omitted) (citation omitted) (internal quotation marks omitted).

11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The "malicious" injury requirement is separate from the "willful" injury requirement. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008).

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." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997)).

A "willful" injury is a "deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphases in original). This willful injury requirement is satisfied "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." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142, 1144–45 (9th Cir. 2002). By contrast, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64.

Thus, the standard is a subjective one, where the debtor must have "either a *subjective intent* to harm, or a *subjective belief [or actual knowledge]* that harm is substantially certain." *Su*, 290 F.3d at 1444 (emphases added). In determining whether the debtor has actual knowledge, the court can infer that the debtor is usually "charged with the knowledge of the natural consequences of his actions." *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). "In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6.

Based on the undisputed facts, starting in 1995, the plaintiff Charni Chima gave authority to the defendant Kirandeep Chima (the debtor in the underlying chapter 7 case) to take charge of her finances, including having possession of keys for the plaintiff's home and mail box, receiving and opening the plaintiff's mail, paying the plaintiff's bills, managing the plaintiff's bank accounts, among other things. As the plaintiff's husband had passed away approximately two years earlier and the plaintiff is not fully proficient in the English language, the plaintiff looked to the defendant, as her daughter-in-law and family member, for help with the management of her finances. Due to the defendant's

representations and familial connection with the plaintiff, the plaintiff relied on the defendant to manage her finances.

Without the plaintiff's knowledge or consent, the defendant largely drained the plaintiff's bank accounts, destroyed her credit rating by opening several credit cards in the plaintiff's name, stole jewelry from a safety deposit box belonging to the plaintiff, and failed to pay many of the plaintiff's bills, precipitating collection actions against the plaintiff. As part of her scheme, the defendant created false bank statements to present to the plaintiff and made many other misrepresentations to the plaintiff about her finances. The defendant also misrepresented herself as the plaintiff in telephone calls with financial institutions.

The scheme of the defendant was not discovered until August of 2017, when the plaintiff physically visited financial institutions at which she had accounts and pulled her credit report.

In pre-petition litigation between the parties, including elder abuse, fraud, and California Penal Code claims, among others, the state court determined that the monetary damages sustained by the plaintiff were $562,893.98. That court entered a final judgment on August 1, 2018 in favor of the plaintiff in the amount of $1,138,659.70, doubling the damages of $562,893.98 (under Welfare and Institutions Code § 15610.30), adding a $10,000 penalty (under California Penal Code § 368), and including attorney's fees ($2,252) and costs ($619.74). The defendant filed the underlying bankruptcy case on August 22, 2018.

The plaintiff's claim was liquidated pre-petition by the state court. The court is unwilling to apply issue preclusion, as there are no findings of fact and conclusions of law from the state court litigation in the record.

Given the foregoing, nevertheless, the court finds the plaintiff's claims here to be sound. The above-outlined facts satisfy the elements of each of the three causes of action under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4) (embezzlement), 523(a)(6).

The defendant was served with the Amended Complaint filed on September 26, 2018 and related reissued summons. Her default was entered on January 9, 2019. Her default was not entered due to excusable neglect.

A default judgment against the defendant is warranted. After entry of an order granting this motion, to be prepared by the moving party, the court will enter a judgment declaring the debt owed to the plaintiff as set by the state court non-dischargeable in the underlying bankruptcy case.

5. 18-14919-A-7 **IN RE: SERGIO MEJIA**
19-1008

STATUS CONFERENCE RE: COMPLAINT
1-14-2019 [1]

MEJIA V. MIDLAND FUNDING, LLC
TIMOTHY SPRINGER/ATTY. FOR PL.
DISMISSED 2/3/19, CLOSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

6. 18-13935-A-7 **IN RE: NICOLAS QUIROZ**
19-1001

STATUS CONFERENCE RE: COMPLAINT
1-4-2019 [1]

QUIROZ V. UNITED STATES
DEPARTMENT OF EDUCATION ET AL
JEFFREY MEISNER/ATTY. FOR PL.

No Ruling

7. 17-10152-A-7 **IN RE: CURTIS DAVIS**
18-1068

CONTINUED STATUS CONFERENCE RE: COMPLAINT
10-5-2018 [1]

SALVEN V. DAVIS, JR. ET AL
PETER SAUER/ATTY. FOR PL.

Final Ruling

Default judgment having been entered, the status conference is concluded.

8. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [131]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
VONN CHRISTENSON/ATTY. FOR PL.

No Ruling