UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 27, 20201 at 11:00 a.m.

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1. 20-20715-E-13 **FOUAD MIZYED**
20-2016 **JL-3 Arasto Farsad**

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
3-30-21 [73]

MIZYED V. FAY SERVICING, LLC ET AL

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on March 30, 2021. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is xxxxx.

Preamble

The following review, discussion, and ruling address in detail the allegations in the Second Amended Complaint, the Motion, and the Opposition. However, while the factual and legal issues were clearly identified, the court does not read the Motion as clearly identifying what the court has found to be the fundamental determinative issue.

At the foundation of each Cause of Action are alleged rights, duties, and obligations arising under and relating to the confirmed Chapter 13 Plan in Plaintiff-Debtor's prior Chapter 13 case, 14-29036. That case was filed on September 7, 2014 and dismissed, at the request of Debtor on May 21, 2019.14-29036; Motion to Dismiss and Order, Dckts. 111, 114.

While a Chapter 13 Plan was confirmed (*Id.*; Confirmation Order, Dckt. 104), it was not completed. *Id*.; Chapter 13 Trustee Final Report, Dckt. 117. As addressed in the Ruling below, the Chapter 13 case being dismissed or converted results in the confirmed Chapter 13 Plan being effectively vacated. The confirmed Chapter 13 Plan does conditionally modify the pre-petition contracts and bind the parties, with such modification being permanent only when Debtor fully performs and completes the Plan.

As the court reads the Second Amended Complaint, all of the Causes of Action are based on the rights and duties of Plaintiff-Debtor and Defendant arising under the Chapter 13 Plan Contract in case 14-29036. That Chapter 13 Plan Contract was vacated and cannot be the basis for alleged breach of rights and duties relating thereto.

In looking at the time line in the current Chapter 13 Bankruptcy Case filed by Plaintiff-Debtor, 20-20715:

- Case 20-20715 was filed on February 7, 2020
- This Adversary Proceeding was filed on February 14, 2020
- U.S. Bank, N.A.'s Proof of Claim 9-1 was filed on April 10, 2020, and stated:

  Secured Claim in the amount of.....($458,332.30)
  Pre-Petition Arrearage in the amount of.....($ 27,390.00)

- U.S. Bank, N.A.'s Amended Proof of Claim 9-2 was filed on April 24, 2020, and stated:

  Secured Claim in the amount of.....($458,332.30)
  Pre-Petition Arrearage in the amount of.....($ 27,390.00)

- First Amended Complaint was filed on June 8, 2020 (Dckt. 25)
- Second Amended Complaint was filed on September 14, 2020 (Dckt. 49)
- U.S. Bank, N.A.'s Second Amended Proof of Claim 9-2 was filed on February 23, 2021, and states:

  Secured Claim in the amount of.....($458,332.30)
  Pre-Petition Arrearage in the amount of.....($ 23,151.06)

  The following adjustment is stated: "Fees and Costs of $4,238.99 have been removed."

It does appear that there is a corollary between Plaintiff-Debtor prosecuting this case and the adjustment being made, which would appear to be the substantive financial correction sought. Unfortunately, it appears that a simple settlement could not be reached whereby the parties could agree to the adjustment being made, a modest recovery of fees, and the Adversary Proceeding dismissed with prejudice.

At the hearing, **xxxxxxx**

REVIEW OF MOTION AND DECISION

U.S. Bank, N.A., as Legal Title Trustee for Truman 2013 SC3 Title Trust and Fay Servicing, LLC ("Defendants") moves for the court to dismiss all claims against it in Fouad Afif Mizyed's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

The Second Amended Complaint ("SAC" or "Complaint") was filed on September 14, 2020. Dckt. 49. The dispute relates to the asserted failure of Defendants to properly apply a $20,000 payment made by Plaintiff-Debtor and their attempted wrongful foreclosure of his home. The Causes of Action identified in the Second Amended Complaint and the allegations made are as follows:

A. Breach of Contract,

B. Breach of Implied Covenant of Good Faith and Fair Dealing,

C. Negligence,

D. Fraudulent Concealment,

E. Fraudulent Misrepresentation, and

F. Unfair or Deceptive Business Practices (Cal. B&P §§ 17200 et seq.)

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For

purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION

The Motion responds to the Complaint's allegations stating the following grounds:

A. The SAC must be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);

B. The Breach of Contract claim fails to state a claim because there was no breach of the 2014 Chapter 13 Plan;

C. Plaintiff's Breach of Implied Covenant of Good Faith and Fair Dealing claim fails because the underlying Breach of Contract claim fails;

D. Plaintiff's Negligence claim fails because there is no breach of duty and Plaintiff has disguised this breach of contract claim as a tort;

E. The Fraudulent Concealment claim fails because this count is not pleaded with the required specificity, and as Plaintiff fails to allege facts to establish the elements of a claim for fraud, including resulting damages;

F. Plaintiff's Fraudulent Representation fails because this count is not

pleaded with the required specificity, and as Plaintiff fails to allege facts to establish the elements of a claim for fraud, including resulting damages; and

G. The last cause of action, pursuant to Business & Professional Code § 17200, et seq. fails because Plaintiff fails to allege standing under the statute and fails to otherwise state a claim as this count is premised on the other counts in the SAC which also fail.

In support of the Motion, Defendants also filed a Memorandum of Points and Authorities. Dckt. 75. The arguments in support of their grounds as stated in the Motion are discussed below under each cause of action.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed a Memorandum of Points and Authorities in Opposition on April 29, 2021. Dckt. 78. Plaintiff-Debtor opposes the Motion on the following grounds:

1. Plaintiff has satisfied the pleading requirements for a breach of contract claim where he alleges the confirmed Chapter 13 plan as the new contract, Plaintiff paid the required $61,765.30 in arrears within 60 months, and Defendants materially breached the agreement by failing to reinstate Plaintiff-Debtor's loan, placing his account in default, and then initiating foreclosure proceedings.

2. Defendants argue that, because the bankruptcy case was dismissed prior to completing the payments, Plaintiff has not performed all of the conditions under the Chapter 13 Plan. However, Defendants fail to acknowledge that Plaintiff had already paid the entire arrearage amount. The case was not dismissed for non-payment, but rather Plaintiff 's voluntary dismissal.

3. The confirmed Chapter 13 Plan is a binding contract between Plaintiff-Debtor and Defendants, and it requires Defendants to act in good faith in dealing with Plaintiff-Debtor. When Plaintiff-Debtor paid off the arrears, he had fulfilled his obligation under the agreement. Yet Defendants did not reinstate his loan, reneged on their promise, failed to reinstate the loan, initiated foreclosure proceedings against Plaintiff's home, mismanaged his account, and unreasonably suspended his account. Thus, Plaintiff-Debtor has sufficiently alleged a claim for breach of the implied covenant of good faith and fair dealing.

4. Whether a duty of care exists is a question of law to be determined on a case-by-case basis. Plaintiff-Debtor discusses *Nymark v. Heart Fed. Savings & Loan Assn*., 231 Cal. App. 3d 1089 (3rd Dist. 1991)). In *Nymark* , the court explained that the question of whether a lender owes such a duty requires 'the balancing of the "*Biakanja* factors." Lenders owe a duty of care to accurately credit borrower's mortgage payments

and to provide a reinstatement amount. *Mahoney v. Bank of Am., N.A.*, 2014 WL 2197068, at *7 (S.D. Cal. May 27, 2014). Lenders owe a duty of care to accurately credit borrower's accounts with her or his payment to cure the default. *Hampton v. US Bank, N.A.*, 2013 WL 8115424, at *3-4 (C.D. Cal. May 7, 2013). Borrower had a negligence claim relating to the servicer imposing an escrow even though she provided proof of her property tax payments. *Barber v. CitiMortgage*, 2014 WL 321934, at *3-4 (C.D. Cal. Jan. 2, 2014).

5. Defendants owed Plaintiff-Debtor a duty of care to accurately credit his payments, properly review his account, and provide an accurate accounting. They breached that duty when they misapplied the $20,000.00 payment, suspended Plaintiff-Debtor's account without reasonable review, refused to accept his payments, and initiated foreclosure proceedings without just cause. These acts underpin Plaintiff-Debtor's claim of negligence.

6. California law and California courts permit a party to a contract to seek tort remedies under certain circumstances, including when the duty of care is independent of the contract or arises from intentional and intending to harm. Thus, Plaintiff-Debtor has a claim where Defendants owed Plaintiff-Debtor a duty of care in processing his loan in a reasonable manner and Defendants acts violated such duty.

7. Defendants have a duty to disclose because Defendants have a contractual relationship with Plaintiff pursuant to the confirmed Chapter 13 plan. Defendants intentionally failed to disclose to Plaintiff that his account was suspended, that they did not apply his $20,000.00 payment to the account, and that they would foreclose on his home. These facts were known only to Defendants. As a result of Defendants' concealment, Plaintiff was damaged. Therefore, Plaintiff has a valid concealment claim against Defendants.

8. Plaintiff-Debtor has alleged all facts to sustain a fraudulent misrepresentation claim as stated in the Complaint. Defendants' assertion that the "issue of the $20,000.00 has been remedied" does not mean that the claim(s) should be dismissed or that the Defendants can avoid paying for the reasonable damages incurred. Plaintiff has been harmed by Defendants' misconduct as he incurred expenses and costs.

9. Plaintiff has a viable UCL claim for the following reasons. The UCL provides injunctive relief and restitution against any unlawful, unfair, or fraudulent business practice. Plaintiff-Debtor has satisfied the unfair prong of the UCL. "An 'unfair' business practice occurs when the practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Plaintiff-Debtor alleges that Defendants' various acts (as listed in the Complaint and below) constitute "unfair" business practice

because the acts offend public policy and are substantially injurious to him and all consumers.

10. Mizyed also has satisfied the unlawful prong, where according to *Klein v. Chevron U.S.A., Inc.,* 202 Cal.App.4th 1342, 1383 (2d Dist. 2012) (quoting Paulus, 139 Cal. App. 4th at 681), any law or regulation—federal or state, statutory or common law—"can serve as [a] predicate for a ... [section] 17200 'unlawful' violation." Plaintiff-Debtor alleges that Defendants' business practices were unlawful because they violated Civil Code §§ 1709 (intentional misrepresentation), 1710 (concealment), and 1714 (negligence).

11. Mizyed also has satisfied the fraudulent prong. A fraudulent practice under the UCL "require[s] only a showing that members of the public are likely to be deceived" and "can be shown even without allegations of actual deception, reasonable reliance and damage." *West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 806 (4th Dist. 2013) (quoting *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838 (2d Dist. 2006)). Defendants' concealment was likely to deceive members of the public and, indeed, did deceive Plaintiff-Debtor. He thought that his payment of $20,000.00 would reinstate the loan but it did not because of Defendants' misconduct.

DEFENDANTS' REPLY

Defendants filed a Reply on May 5, 2021. Dckt. 79. The Reply Memorandum argues the following:

1. Plaintiff does not offer any evidence in support of his contention that the arrears were paid because the fact of the matter is that only $37,051.38 of the outstanding balance of $61,765.31 was paid by Plaintiff before he voluntarily dismissed that Bankruptcy.

2. Plaintiff's reliance on Hampton v. US Bank, N.A., 2013 WL 8115424, at *3-4 (C.D. Cal. May 7, 2013, is misplaced because the facts relied on by that court in finding the servicer owed borrower a special duty are distinguishable from the facts in the case at hand. In that case, the defendants made representation to the debtor in connection with a loan modification. In the instant case, no such representations were made. Moreover, Defendants have not stepped outside their conventional role as a money lender and owe no duty to Plaintiff.

3. Defendants did not have any legal duty to disclose that a payment was not applied to Plaintiff's account. Plaintiff cites to case law that a duty to disclose may arise out of a contractual relationship but fails to show under what circumstance the duty to disclose arise between a borrower and loan servicer in the context of a chapter 13 bankruptcy. Plaintiff did

not inquire into the payment to Defendants, and the Defendants did not make any representations as to the subject payment.

4. Plaintiff fails to meet the heighten pleading requirements for a claim of fraud against a corporation. Plaintiff fails to set forth what was false or misleading about the statement, nor does Plaintiff describe what action he was induced into taking as a result of the alleged misrepresentation.

5. Plaintiff does not have any viable underlying claims that can serve as the basis for his UCL claim. Further, Plaintiff fails to identify any underlying laws Defendants purportedly breached other than those set forth in the SAC.

DISCUSSION

The court's review of the Second Amended Complaint and the short plain statement of the claims asserted therein and grounds stated is, as relevant to this Motion, are summarized in a narrative and identified to the paragraph (¶) of the Second Amended Complaint.

Before beginning an analysis of each claim the court first considers the confirmed Chapter 13 Plan and its terms. The Second Amended Complaint incorporates by reference the confirmed Chapter 13 Plan in Plaintiff's Chapter 13 case, 14-29036. A copy of the Chapter 13 Trustee's final report in Plaintiff's Chapter 13 case is included as an exhibit provided by Defendant. Exhibit 13; Dckt. 76. The Trustee Final Report includes the following information:

A. The Chapter 13 Case was filed on September 7, 2014.

B. The Chapter 13 Plan was confirmed on March 23, 2015.

C. The Chapter 13 Case was dismissed on May 21, 2019.

D. Fay Servicing was paid $101,006.32 and $37,051.38 on its secured claim (principal and arrearage)

The Chapter 13 Case was dismissed upon the Motion of Plaintiff. 14-29036; Motion, Dckt. 111. The Motion states that Plaintiff had reached a "deal" with the loan servicer, and though Plaintiff was close to completing the Chapter 13 Plan, Plaintiff believed that dismissal was to Plaintiff's advantage.

As requested by Plaintiff, the court dismissed the Chapter 13 case. *Id.*; Order, Dckt. 114. With the dismissal of the Chapter 13 bankruptcy case, the Chapter 13 Plan could not be completed, was breached, and did not constitute a modified contract between the parties. As addressed by the Ninth Circuit Court of Appeals in *In re Nash*, 765 F.2d 1410, 1413 (9th Cir. 1985) the dismissal of a Chapter 13 case effectively vacates the plan confirmed in that case and the parties are not bound by the terms of the plan after dismissal.

Breach of Contract

Defendants argue that the claim for breach of contract fails because there was no breach of the Chapter 13 Plan on the part of Defendants where Debtor failed to perform his obligations under the Chapter 13 Plan. Defendants allege that according to the Trustee's Final Report and Account, only $37,051.38 of the $61,765.31 claim had been paid.

Here, Plaintiff alleges that once a Chapter 13 Plan is confirmed, the confirmed Plan becomes the agreement, the new contract between a debtor and creditor. Complaint, ¶ 31. Plaintiff-Debtor had a confirmed plan as of March 2015. *Id.*, ¶ 30.

Plaintiff alleges that Plaintiff-Debtor submitted a payment of approximately $20,000 which would complete the cure for the $61,765.31 default and bring his loan current. Complaint, ¶ 32. Plaintiff-Debtor presents evidence that Defendants cashed the $20,000 check while Plaintiff-Debtor was still in the first Chapter 13 plan. Exhibit C, Dckt. 6. Plaintiff-Debtor further pleads Defendants breached the new agreement when after making the payment, Defendants failed to reinstate his account. Complaint, ¶ 34. Defendants also breached by placing his account in default and initiating foreclosure proceedings. *Id.*, ¶ 35. As a direct result, Plaintiff has suffered damages by incurring costs, expenses, and attorney's fees. *Id.*, ¶¶ 36, 38.

As argued by Defendants, Debtor fails to provide allegations regarding the payoff amount of the default so as to show whether the $20,000 was sufficient to reinstate his account. It may be that this is an issue that may be solved pursuant to discovery where a review of the loan file, the Trustee's Report, and any communications Plaintiff-Debtor had with Defendant at the time of the $20,000 may shed some light regarding the payoff amount as represented to Plaintiff-Debtor which would have made him believe that the $20,000 payment would reinstate his account.

Plaintiff-Debtor states allegations that meets a breach of contract where Plaintiff-Debtor alleges to have performed by making a payment that paid off the arrearage and alleges a breach in the part of Defendants where Defendants failed to reinstate his loan, placed Plaintiff-Debtor's account in default, and initiated foreclosure proceedings.

Based on the Second Amended Complaint and the May 21, 2019 dismissal of the Chapter 13 as reflected in the court's file and Exhibit 13 (Dckt. 76) there was no "contract" based on a Chapter 13 Plan to be breached.

It may be that Plaintiff-Debtor had other agreements with Defendants, but the First Cause of Action is clearly based on the alleged contract that was breached was the contract as provided in the Chapter 13 Plan.

The Motion to Dismiss as to the cause of action for Breach of Contract, based on the alleged contract to be the Chapter 13 Plan in Bankruptcy Case 14-29036 that was dismissed, is granted and the First Cause of Action based on the alleged Chapter 13 Plan Contract is dismissed.

Breach of Implied Covenant of Good Faith and Fair Dealing

For this claim, Defendants argue that there was no Breach of Implied Covenant of Good Faith and Fair Dealing because Plaintiff-Debtor's claim for breach of contract fails and there was no breach of

contract where Plaintiff-Debtor failed to perform, or complete, the Chapter 13 Plan.

This Second Cause of Action alleges the Breach to have been made in connection with the Chapter 13 Plan contract. Complaint, ¶ 42, 44. As addressed above, electing to dismiss Chapter 13 case 14-29036 vacated the Plan in that case.

The Motion to Dismiss as to the Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing arising from the Chapter 13 Plan in Case 14-29036 is granted and said Second Cause of Action is dismissed.

Negligence

Defendants argue that Plaintiff-Debtor's Third Cause of Action for Negligence fails because a lender owes no duty of care to a borrower when only acting as a "mere lender of money" and negligence is not the appropriate cause of action where the note is the agreement alleged to have been breached under this claim. Thus, the proper claim would be a breach of contract.

In the Complaint, Plaintiff first alleges that Defendants, as lenders, owe a duty of care to accurately credit mortgage payments, provide a reinstatement amount, accurately credit borrower's accounts with payment to cure the default. *Id.*, at ¶ 49. Plaintiff then alleges that Defendants acted unreasonably and recklessly in dealing with Plaintiff when they breached their duty to Plaintiff by misapplying the $20,000 payment, suspending Plaintiff's review, initiated foreclosure proceedings without properly reviewing Plaintiff's account and refusing to Plaintiff's payments. *Id.*, at ¶¶ 52, 53. Further alleging that Defendants should have known that the $20,000 was to pay for the arrearage and they should have applied said payment to his account, should have reinstated his loan, and should not have initiated the foreclosure. *Id.*, at ¶ 54.

This Third Cause of Action asserts that the negligence occurred based on the terms of the Chapter 13 Plan Contract. As addressed above, that Contract was vacated when Plaintiff-Debtor elected to dismiss Chapter 13 Case 14-29036. The Second Amended Complaint and Third Cause of Action do not state a basis for a duty arising that was breached other than the Chapter 13 Plan Contract that was vacated.

This Third Cause of Action For Negligence is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged negligence other than the Chapter 13 Plan Contract in the dismissed case.

Fraudulent Concealment

The Fourth Cause of Action is for Fraudulent Concealment, with Plaintiff-Debtor again asserting that these non-disclosures were in violation of the Chapter 13 Plan Contract. That Chapter 13 Plan Contract having been vacated when the Chapter 13 Case 14-29036 was dismissed at the request of Debtor.

The court grants the Motion and Dismisses without prejudice the Fourth Cause of Action for Fraudulent Conveyance. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Concealment other than the Chapter 13 Plan Contract in the dismissed case.

Fraudulent Misrepresentation

For the Fifth Cause of Action for Misrepresentation, Defendants argue that Debtor does not sufficiently plead fraud with the specificity required. According to Defendants, Plaintiff-Debtor alleges that the misrepresentation stated was that Plaintiff-Debtor was told that he was in default under the plan, that he would have to pay the $20,000 plus regular monthly payments to reinstate his loan; and that this was a fraudulent statement because he was not in default under the Plan. Defendants argue that Plaintiff has failed to state what was false or misleading about that statement, and why it is false, when taking into account that Plaintiff that the $20,000 payment was applied to his loan and a review of Trustee's Final Accounting reflects that sufficient payments had not been made through the plan to reinstate the loan. Further arguing, that the $20,000 issue has been resolved now that an Amended Proof of Claim has been filed.

These "Fraudulent Misrepresentations" focus back on the Chapter 13 Plan Contract, which Contract was vacated when Chapter 13 Case 14-29036 was dismissed at the request of Plaintiff-Debtor. It is alleged that the conduct of Defendants were improper based on the Chapter 13 Contract.

The Motion to Dismiss as to the Fifth Cause of Action for Fraudulent Misrepresentation is granted and Fifth Cause of Action is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Misrepresentation other than the Chapter 13 Plan Contract in the dismissed case.

Unfair or Deceptive Business Practices (Cal. B&P §§ 17200 et seq.)

Defendants argue that the Sixth Cause of Action for Unfair or Deceptive Business Practices fails because it is based on the other causes of action and thus it cannot survive where Defendants argue Plaintiff-Debtor fails to plead allegations to support causes of action one through five.

In the Complaint, Plaintiff alleges that Defendants' unlawful business acts and practices include, but are not limited to, those pursuant to California Civil Code § 1710, for Fraudulent Concealment and Misrepresentation, and California Civil Code § 1714, for Negligence, and that a violation of any of these underlying laws is a *per se* violation of the UCL. *Id.*, at ¶ 83. Plaintiff further asserts that Defendants violated these statutes as described above, including misapplying Plaintiff-Debtor's payments; providing inaccurate information, and initiating foreclosure proceedings. *Id.*, at ¶ 84. Plaintiff-Debtor then alleges unfairness in part of Defendants and provides a list of practices that constitute how Defendants allegedly acted unfairly and how they constitute unfair business practices. *Id.*, at ¶¶ 85-88. Plaintiff-Debtor also makes various other allegations stating that Defendants's actions were oppressive, fraudulent, and illegal and likely to deceive the public and Plaintiff. *Id.*, at ¶¶ 89-93. Lastly, that as a result of such practices Plaintiff suffered specific injuries. *Id.*, at ¶ 95.

Again, these are alleged to be unfair or deceptive based on the asserted Chapter 13 Plan Contract which was vacated by the dismissal of Chapter 13 Case 14-29063 at the request of Debtor.

The Motion to Dismiss as to the cause of action for Unfair or Deceptive Business Practices (Cal. B&P §§ 17200 et seq.) is granted and the Sixth Cause of Action is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Unfair or Deceptive Business Practices other than the Chapter 13 Plan Contract in the dismissed case.

RULING

The Motion is Granted, and:

A. The First Cause of Action for Breach of the Chapter 13 Contract in Chapter 13 Case 14-29063 is dismissed.

B. The Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing with respect to the Chapter 13 Plan Contract in Chapter 13 Case 14-29063 is dismissed.

C. The Third Cause of Action For Negligence is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged negligence other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

D. The Fourth Cause of Action for Fraudulent Concealment is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Concealment other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

E. The Fifth Cause of Action for Fraudulent Misrepresentation is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Misrepresentation other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

F. The Sixth Cause of Action for Unfair or Deceptive Business Practices (Cal. Civ. §§ 17200 et seq.) is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Unfair or Deceptive Business Practices (Cal. Civ. §§ 17200 et seq.) other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

The court shall issue an order substantially in the following form holding that:

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

The Motion to Dismiss Adversary Proceeding filed by U.S. BANK, NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC 6 TRUST ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted, and:

A. The First Cause of Action for Breach of the Chapter 13 Contract in Chapter 13 Case 14-29063 is dismissed.

B. The Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing with respect to the Chapter 13 Plan Contract in Chapter 13 Case 14-29063 is dismissed.

C. The Third Cause of Action For Negligence is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged negligence other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

D. The Fourth Cause of Action for Fraudulent Concealment is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Concealment other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

E. The Fifth Cause of Action for Fraudulent Misrepresentation is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Fraudulent Misrepresentation other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

F. The Sixth Cause of Action for Unfair or Deceptive Business Practices (Cal. Civ. §§ 17200 et seq.) is dismissed without prejudice. The court dismisses it without prejudice to insure that it will not be misunderstood that the dismissal would apply to a basis for the alleged Unfair or Deceptive Business Practices (Cal. Civ. §§ 17200 et seq.) other than the Chapter 13 Plan Contract in Chapter 13 Case 14-29063.

2. **20-20715-E-13 FOUAD MIZYED**
20-2016
MIZYED V. FAY SERVICING, LLC
ET AL

CONTINUED STATUS CONFERENCE
RE: AMENDED COMPLAINT
9-14-20 [49]

Plaintiff's Atty: Arasto Farsad; Nancy W. Weng
Defendant's Atty: Jana Logan

Adv. Filed: 2/14/20
Answer: none
First Amd. Cmplt Filed: 6/8/20
Answer: none
First Amd. Cmplt Filed: 9/14/20
Answer: none

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

Notes:
Continued from 5/20/21 to be conducted in conjunction with Defendant's Motion to Dismiss this Adversary Proceeding.

The Status Conference is xxxxxxx

3. **18-25001-E-7** **JOSEPH AKINS** **MOTION FOR SUMMARY JUDGMENT**
18-2187 **RLF-15 Shelia Nelson** **AND/OR MOTION FOR SUMMARY**
BLACK V. AKINS **ADJUDICATION, MOTION FOR JUDGMENT**
4-14-21 [145]

No Tentative Ruling: The Motion For Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 21 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on April 14, 2021. By the court's calculation, 43 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Summary Judgment is xxxxx.

May 27, 2021 Hearing

In the discussion below, the court reviews in detail the Motion and supporting evidence, as well as the First Amended Complaint and the Opposition. The Motion raises many factual disputes, asserting that Plaintiff can offer no evidence to prove the allegations in the First Amended Complaint.

The Motion also asserts that the issues of fraud and other torts were resolved in the Marin Litigation wherein Plaintiff obtained his judgment against Debtor. Therefore, it is asserted that Issue

Preclusion applies to bar relitigating those torts for nondischargeability purposes.

Plaintiff responds, first asserting that the Marin Litigation Judgment was not just for the contract claim as asserted by Defendant-Debtor Representative, but also for the tort claims. Further, that if the court does not find Plaintiff's testimony to be that credible, on its face the Marin Litigation Judgment does not deny such relief, but does not state on what claims the relief was granted. Additionally, Plaintiff provides his declaration in opposition to the Motion.

The Motion, its supporting pleadings, and Defendant-Debtor Representative's Reply pleadings total 678 pages to show that there are no facts in genuine dispute. Plaintiff's Opposition pleadings weigh in at 354 pages. While the court does not grant or deny motions for summary judgment by physically "weighing them," the court is reminded of an adage of an experience federal judge who had found that over the years the appropriateness of granting the motion decreases as the amount of pages to show that there are no facts in dispute increases.

The court has waded part way into the various allegations and evidence, but it appears that there is a fundamental issue that must be addressed beforehand – the application of Issue Preclusion upon which both Plaintiff and Defendant-Debtor Representative assert the right to prevail.

A copy of the Marin Litigation Judgment obtained by Plaintiff is provided as Exhibit 3 by Defendant-Debtor Representative and acknowledged as authentic by Plaintiff. The Marin Litigation Judgment states that it was a court (not clerk) ordered judgment after the court considered the evidence and testimony provided by Plaintiff. Exhibit 3, Marin Litigation Judgment; Dckt. 164 at 42. While granting judgment for Plaintiff against Debtor and other named defendants in the Marin Litigation Action, that Judgment does not state the claims in the Marin Litigation First Amended Complaint for which judgment was granted Plaintiff against Debtor.

Plaintiff provides his testimony in a Declaration that at the February 19, 2010 prove-up hearing in the Marin Litigation, the court expressly stated that it was awarding Plaintiff judgment on all of the causes of action, including fraud and embezzlement.

Plaintiff also directs the court to Exhibit 2 filed by Defendant-Debtor Representative, which is identified by both the Parties as the Register of Actions (docket) maintained by the State Court for the Marin Litigation. There is the entry for a Minute Order for February 19, 2010, which states:

> MINUTE ORDER POSTED - Appearance: 02/19/2010 at 8:30AM for HEARING 02/19/2010
>
> JUDGE/PROTEM/REFEREE VERNA A. ADAMS , REPORTER SUE FITZSIMMONS, DEP CLK J. MINKIEWICZ
>
> PLAINTIFF/PETITIONER DOMINIQUE BLACK IS PRESENT IN PRO PER
>
> MATTER COMES BEFORE THE COURT FOR DEFAULT PROVE-UP HEARING.
>
> WITNESS(ES) SWORN AND TESTIFIED: DOMINIQUE BLACK
>
> IT IS ORDERED: DEFAULT JUDGMENT GRANTED.

JUDGMENT
SUBMITTED
AND
SIGNED IN
OPEN
COURT.

ENTERED
BY: JM

Exhibit 2; Dckt. 164 at 35.

This reflects that there was a reporter for the hearing, Sue Fitzsimmons. It is not clear whether the transcript of the hearing has been requested. If so and it is produced for this court, then a proper determination can be made based on the actual words of the judge in the Marin Litigation.

Before going further, this court must definitively ascertain whether a record of the Marin Litigation judge's findings and conclusions, as stated on the record, exists and that it can, or cannot, be presented to this court.

At the hearing **xxxxxxx**

REVIEW OF MOTION

Dominique Black ("Plaintiff ") commenced this Adversary Proceeding on November 13, 2018, by filing a Complaint naming Joseph H. Akins, identified as the Debtor and Defendant ("Debtor"). Dckt. 1. The Complaint alleged that Debtor commenced a voluntary Chapter 7 bankruptcy case on September 12, 2018. The Complaint sought a determination that the obligation owed to Plaintiff by Defendant-Debtor was nondischargeable and that Debtor should be denied a discharge in his Chapter 7 case.

On April 4, 2019, the First Amended Complaint in this Adversary Proceeding names Joseph H. Akins, an individual, as the Defendant. Dckt. 21. Plaintiff's then counsel (who subsequently was authorized to substitute out, with Plaintiff now prosecuting the Adversary Proceeding *in pro se*) served the summons and complaint on Joseph H. Akins, 1319 East Tennessee St., Fairfield, California. Cert. of Serv.; Dckt. 226.

On October 5, 2020, the court entered an order substituting in Joseph H. Akins, Jr. ("Defendant-Debtor Representative"), the son of the Debtor, as the representative for all of Defendant-Debtor's Interest. A Notice of Death stating that the Debtor had passed away on January 1, 2020 was filed with the court. Dckt. 48.

Status of Pleadings

In response to the First Amended Complaint, Debtor filed a Motion to Dismiss. Dckt. 37. The Motion to Dismiss was denied without prejudice (Order, Dckt. 51) due to "procedural and substantive issues" (Civil Minutes, Dckt. 50).

A second Motion to Dismiss was filed on July 19, 2019. Dckt. 54. The second Motion to Dismiss was denied and Debtor being given until September 12, 2019, to file his answer. Order, Dckt. 82.

No Answer was filed by Debtor and no Answer has been filed by Defendant-Debtor Representative since being substituted in this Adversary Proceeding in place of the late Debtor.

In lieu of filing an answer, Defendant-Debtor Representative jumped directly to filing a Motion for Summary Judgment. Dckt. 145.

Review of the First Amended Complaint

Plaintiff seeks a determination that Plaintiff's claim(s) are nondischargeable pursuant to 11 U.S.C. §§ 523 (a)(2)(A) for fraud, 523 (a)(4) for embezzlement, 523 (a)(4) for larceny, and 523 (a)(6) for willful and malicious injury. Dckt. 21. The First Amended Complaint states four causes of action over sixty-nine (69) paragraphs.

In reviewing the First Amended Complaint the court is cognizant of the pleading requirements stated by the Supreme Court that the complaint must provide more than labels and conclusions, or a formulaic recitation of a cause of action; it must plead factual allegations sufficient to raise more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Federal Rule of Civil Procedure 8, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell Atlantic*, the pleading standard under Rule 8 does not require "detailed factual allegations," but it does demand more than an unadorned accusation or conclusion of a cause of action. *Bell Atlantic*, 550 U.S. at 555.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

While this is not a motion to dismiss, Defendant-Debtor Representative's Summary Judgment Motion is based on there not being sufficient "evidence" to support the allegations. As discussed below, no answer to the First Amended Complaint has been filed and the various factual allegations are uncontested.

The uncontested factual allegations include the following:

a. "Plaintiff was the owner of a 1977 Classic GMC Motorhome (the 'Vehicle')." First Amd. Complaint, ¶ 8.

b. Debtor conspired with several other individuals to deprive Plaintiff of the Vehicle and:

i. Kept monies advanced for restoration and customization services; and

ii. Dismantled the Vehicle and absconded with any remaining parts of value.

Id.

c. Plaintiff relief on Debtor's representation that "they" possessed all the necessary licensing and expertise to complete the restoration and customization project. *Id*.

d. Debtor charged Plaintiff for restoration work not performed on the Vehicle and took the remaining parts from the Vehicle for Debtor's own benefit. *Id*.

e. Plaintiff purchased the Vehicle in 1999. *Id*., ¶ 9.

f. Plaintiff approached David Tirpak and Anthony Sarganis, who represented that they, along with Debtor, were owners and operators of Nor-Cal Classic GMC Motorhome ("NORCAL"). *Id*., ¶ 11.

g. Debtor and his "associates" represented that NORCAL was a GMC licensed facility specializing in such restoration. *Id*. ¶ 12.

h. During all relevant times to the First Amended Complaint, neither Debtor, his "associates," nor NORCAL possessed such GMC license or certification. *Id*. ¶ 13.

i. Debtor and his "associates" in NORCAL represented to Plaintiff that NORCAL could perform all necessary restoration services on the Vehicle. *Id*. ¶ 14.

j. Debtor and his "associates" in NORCAL represented that they had a California Bureau of Auto Repair license. *Id*. ¶ 15.

k. In July 1999 Plaintiff, Debtor, and NORCAL entered into an oral agreement to conduct an official California inspection of the out of state Vehicle for California licensing prior to commencing the restoration and customization work. *Id*. ¶ 16.

l. Following the inspection, Plaintiff, Debtor, and NORCAL entered into an oral agreement to perform restoration and customization of the Vehicle. *Id*. ¶ 17.

m. Between November 2000 and January 2006, Plaintiff, Debtor entered into a series of oral amendments to the oral agreement due to changes and delays on the part of NORCAL. *Id*. ¶ 18.

n. Between November 2000 and January 2006, Debtor and NORCAL represented to Plaintiff that they would be purchasing various parts and materials for the restoration and customization of the Vehicle. *Id*. ¶ 19.

o. Plaintiff advanced $147,622.75 to Debtor and NORCAL based on their invoices for restoration and customization alleged to have been carried out by Debtor and NORCAL. *Id*. ¶ 20.

i. Exhibit 1 to the First Amended Complaint are a series of spread sheets, each titled "Norcal GMC Restoration Audit." Each line item is identified by an Invoice Date.

p. In January 2006 Tirpak, on behalf of NORCAL, admitted to Plaintiff that "They" had created fraudulent invoices for the Vehicle project and they had "embezzled advanced funds" received from Plaintiff. *Id*. ¶ 23.

q. With respect to the Debtor, the First Amended Complaint alleges:

i. In 2002 Tirpak informed Plaintiff that Debtor was associated with NORCAL and Debtor was primarily responsible for "finish work" on NORCAL restorations. *Id*. ¶ 24.

ii. Debtor was an associate of Tirpak and an owner or associate of NORCAL. *Id*. ¶ 25.

iii. Plaintiff met Debtor for the first time in late 2005 or early 2006 at the NORCAL facility. *Id*. ¶ 26.

iv. Debtor represented to Plaintiff that Debtor has a Bureau of Automotive Repair license and would perform the specialized body and paint customization as part of the Vehicle project. *Id*. ¶ 27.

v. Debtor also represented to Plaintiff that Debtor has a GMAC license and was under contract to GMC through Hilltop Buick. *Id*. ¶ 28.

vi. In or about June 2006, Debtor and NORCAL represented to Plaintiff that the project was substantially complete and only wiring and paint work by Debtor remained to be done. *Id*. ¶ 29.

vii. Debtor and NORCAL demanded Plaintiff provide them with releases from any liability for the work performed or payments advanced before they would release the Vehicle to Plaintiff. *Id*. ¶ 30.

viii. In or about June 2006, Plaintiff was informed, from an unidentified source, that Debtor's brother was using the Vehicle for drug manufacturing. *Id*. ¶ 31.

ix. Debtor and NORCAL made false representations that they would return the Vehicle to Plaintiff for the purpose of retaining the Vehicle for their own benefit and criminal activity. *Id*. ¶ 32.

x. On or about September 22, 2006, Debtor and Tirpak executed an

Assignment Agreement whereby Debtor assumed Tirpak's interest in the lease of the NORCAL business and facilities. *Id*. ¶ 34.

(1) Attached as Exhibit 2 to the First Amended Complaint is a copy of the alleged Assignment Agreement.

xi. Following execution of the Assignment, Debtor took sole possession of the NORCAL facility and the Vehicle. *Id*. ¶ 35.

xii. Plaintiff made multiple demands on Debtor and NORCAL to return the Vehicle, but they refused. *Id*. ¶ 37.

xiii. After the lease of the NORCAL property to Debtor expired, Plaintiff made arrangements with the owner of the property to obtain possession of the Vehicle. *Id*. ¶ 41.

(1) It is alleged that up Debtor learning of the arrangement for Plaintiff to obtain the Vehicle, Debtor "dismantled and vandalized the Vehicle and absconded with all remaining parts before abandoning it and the NORCAL facility." *Id*. ¶ 42.

xiv. Plaintiff alleges that Debtor abandoned the Vehicle on a public roadway, where it had been rendered completely inoperable and dismantled beyond economic repair. *Id*. ¶ 43.

xv. Plaintiff alleges that Debtor vandalized the Vehicle by pouring paint on it, leaving waste in it, and manufacturing narcotics in the Vehicle. *Id*. ¶ 44.

r. In February 2009, Plaintiff commenced litigation in the Marin County Superior Court ("Marin Litigation") against Debtor, David Tirpak, NORCAL, Kazuko Tirpak, Anthony Sarganis, and Albert Akins. *Id*. ¶ 45.

s. Judgment was entered in the amount of $323,804.85 in favor of Plaintiff and against Debtor and the other defendants in the Marin Litigation, jointly and severally. *Id*. ¶ 46. A copy of the Marin Litigation judgment is not attached to the First Amended Complaint.

t. As of the April 9, 2018 filing of bankruptcy, Plaintiff computes the Marin Litigation judgment balance to be $187,450.97, there to be $6,162.00 interest for the period from April 11, 2018 to August 8, 2018, and that the per diem interest accrual is $51.35. *Id*. ¶ 49.

1st Cause of Action - Fraud - 11 U.S.C. § 523(a)(2)(A)

For the First Cause of Action Plaintiff alleges that false representations were made by Defendant, directly or through his associates, about being a registered, licensed GMC repair facility to do restoration and customization work as requested by Plaintiff. Defendant, and his associates, falsely represented that they possessed all of the licenses required under California law to do the work on the

Vehicle. These false representations occurred over a period running from 1999 through 2006. Defendant and NORCAL misrepresented that they ordered parts and made restoration work when such did not occur.

The misrepresentations were made to induce Plaintiff to make additional payments and advances to Defendant and NORCAL for work not actually done and parts not actually purchased. Defendant and NORCAL misrepresented that work was being done to retain possession of the Vehicle so that Defendant's brother could continue to use it for living accommodations and a drug manufacturing laboratory.

Plaintiff relied upon those misrepresentations, allowing Defendant and NORCAL to retain possession of the Vehicle and made payments of money to Defendant and NORCAL. Plaintiff has been damaged by such misrepresentations and reliance thereon in an amount of not less than $193,612.97.

2nd Cause of Action - Embezzlement - 11 U.S.C. § 523(a)(4)

The Second Cause of alleges that Plaintiff, as the owner of the Vehicle, entrusted the vehicle to Defendant, NORCAL, and associates. This was under an oral contract for Defendant and NORCAL to do restoration and customization work on the Vehicle owned by Plaintiff. In 2006, Plaintiff demanded that Defendant return the Vehicle to Plaintiff. Defendant failed to return the Vehicle, retaining it for Defendant's personal use, including as a residence and drug manufacturing laboratory.

In addition to the unauthorized use, Defendant also removed parts from the Vehicle entrusted to him by Plaintiff. Defendant then took and used those parts for Defendant's own benefit. Plaintiff also paid Defendant and NORCAL for additional parts to be used in the restoration and customization of the Vehicle. When purchased with the monies provided by Plaintiff, the parts were taken by Defendant and NORCAL and used for their own personal benefit. The damages flowing from this alleged conduct are not less than $193,612.97.

3rd Cause of Action - Larceny - 11 U.S.C. § 523(a)(4)

In the Third Cause of Action, Plaintiff alleges an alternative theory of liability in the event that Defendant was not an owner of NORCAL and not involved in the business such that he was entrusted with the Vehicle and the parts purchased with monies advanced by Plaintiff. It is alleged that Defendant took possession of the Vehicle when he had no right to so do (it not being entrusted to him for the restoration and customization) and used, without authorization, the vehicle with his brother as alleged above. Further, that Defendant then dismantled the vehicle, took and sold the dismantled parts, and took and sold the parts purchased with the monies advanced by Plaintiff. Defendant's taking of the vehicle, dismantling, taking of parts, and selling of parts were unauthorized and Defendant was not entitled to possession of the vehicle or parts taken. The damages arising from the alleged larceny is $193,612.97.

4th and Second "4th" (misnumber as a second "4th cause of action) Causes of Action - Intentional Injury/Conversion, 11 U.S.C. § 523(a)(6) and Intentional Injury/Damage to Property

For these two Causes of Action asserted under 11 U.S.C. § 523(a)(6) Plaintiff asserts that the Vehicle, while entrusted to Defendant for the restoration and customization work was vandalized by Defendant as alleged above. This included: (1) intentionally spilling paint on the Vehicle, (2)

intentionally removing parts from the Vehicle, (3) intentionally and improperly taking possession of parts purchased with monies advanced by Plaintiff for the Vehicle and disposing of those parts for Defendant's own benefit, (4) Defendant improperly took and retained possession of the Vehicle without authorization from Plaintiff, and (5) manufacturing drugs in the Vehicle, which damaged the Vehicle. These were intentional acts with Defendant knew would necessarily cause damage to Plaintiff and Plaintiff's property (the Vehicle). Defendant had no just cause or excuse to cause such damage to Plaintiff and Plaintiff's property. Defendant's knowledge of the wrongfulness of his conduct is manifested by Defendant demanding releases from Plaintiff in advance as a condition of any return of the Vehicle to Plaintiff. The damages caused by Defendant are at least $193,612.97.

Prayer for Relief

A. Defendant's obligations and debts to Plaintiff in an amount not less than $193,612.97 are excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2); 523(a)(4); and 523(a)(6).

B. Plaintiff's costs incurred herein; and

C. For such other relief as the Court deems just and appropriate.

Review of the Answer

No answer has been filed to the First Amended Complaint.

REVIEW OF MOTION FOR SUMMARY JUDGMENT

Defendant-Debtor Representative requests summary judgment as to each cause of action, or partial for that which is not in genuine dispute. Dckt. 145. The Factual Allegations stated in the Motion for Summary Judgment are (identified by paragraph number used in the Motion, pp 2-3):

1. Plaintiff alleges to have purchased the Vehicle and made an agreement with Tirpak and Sarganis, and their business known as NORCAL in 1999 to customize the Vehicle. Plaintiff alleges that the Debtor was an associate of Tirpak, Sarganis, and NORCAL.

   Defendant then alleges that no "admissible evidence" to support that allegation has been produced. The court notes that as of the filing of the Motion, the allegations in the First Amended Complaint had not been denied by Defendant-Debtor Representative. [Fn.1.]

FN. As discussed in 2 Moore's Federal Practice - Civil § 8.07[1]:

[1] Averments to Which Responsive Pleading Required Deemed Admitted If Not Denied

Failure to deny an averment in a pleading to which a responsive pleading is

required, other than as to the amount of damages, is deemed an admission. Responsive pleadings are required to the complaint, a counterclaim denominated as such, an answer containing a crossclaim, and a third-party complaint. The court may order a reply to an answer or a third-party answer (see Ch. 7, Pleadings Allowed; Form of Motions and Other Papers).

The court addresses this in the discussion below.

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2. Plaintiff alleges that Debtor was an associate of Tirpak, Sarganis, and NORCAL, but has not presented admissible evidence of such.

   Further, that Plaintiff has alleged meeting Debtor in 2002, that Debtor was an associate of Tirpak, Sarganis, and NORCAL, and that Debtor took over the NORCAL business in 2006.

3. It is asserted that the allegations in a State Court First Amended Complaint "identified only representations by Tirpak to Plaintiff," all of which preceded any meeting between Plaintiff and Debtor.

4. Further, the State Court First Amended Complaint asserted claims against Debtor as they relate to wrongfully asserted storage lien and a claim of vandalism.

5. Both the State Court First Amended Complaint and the Federal Court First Amended Complaint now before this court contain assertions for which there is no admissible evidence.

6. Debtor sublet the 541 Irwin property in or about August 2005 through August 31, 2006.

7. Plaintiff alleges that the customization proceeded from about 1999 on the Vehicle, which he claims as his property, but ownership of the Vehicle is unclear.

8. No evidence has been presented that Debtor was an associate of Tirpak, Sarganis, and NORCAL, or as to the vandalism to the Vehicle.

9. Plaintiff pursued insurance claims relating to the Vehicle, was sued by his insurance carrier, and some litigation may still be pending.

Recitation of Facts in Motion

Defendant-Debtor Representative then lists Facts and Judicially Noticed information in the Motion, identified by the paragraph number used in the Motion, as follows:

10. The Default Judgment obtained by Plaintiff against Debtor on February 19, 2010 was for contract damages only. Reference is made to the "RJN Marin Docket highlighted."

11. The court in the Marin Litigation did not enter an award for attorney's fees or punitive damages.

12. Defendant-Debtor Representative computes the balance on the Marin Litigation judgment to be $9,637.46 using the "San Diego Judgment Calculator."

19. The Marin Litigation judgment was obtained only for a breach of contract claim and not other claims asserted.

20. Defendant-Debtor Representative cites the court to California Code of Civil Procedure § 425.115, asserting that it "requires a statement of reservation of damages to be served by the same process as that required for service of a summons to support entry of a default judgement for torn claims. . . ."[1]

21. The Marin Litigation judgment is not one for fraud, which is what Plaintiff sought in the Marin Litigation complaint.

27. The Marin Litigation judgment, being limited to the breach of contract claim relief is preclusive and bars Plaintiff from seeking to relitigate tort claims in this Adversary Proceeding.

30. Alternatively, judgment should be granted Defendant-Debtor Representative because it is asserted that Plaintiff can offer no evidence to support the allegations in the First Amended Complaint (which allegations Defendant-Debtor Representative has not disputed).

34. With respect to a claim for embezzlement, California State Law (statute not identified in the Motion) requires that a civil action must be brought within three years of the alleged embezzlement.

48. With respect to a claim for larceny, it is asserted that the California Statute of Limitations is three years (statute not identified in the Motion) and the federal common law has a five year statue of limitations.

Review of Evidence in Support of Motion for Summary Judgment

Testimony is first provided by Sheila Gropper Nelson, counsel for Defendant-Debtor Representative and Defendant Dckt. 149. She states that the testimony given is either that based on her personal knowledge (as is required by Federal Rules of Evidence 601, 602) or based on (mere)

[1] A review of California Code of Civil Procedure § 425.115 discloses that it relates to a situation where a plaintiff obtaining a default judgment wants to preserve a right to punitive damages (Cal. Civ. 3294) a notice must be given to the defendant that punitive damages are sought, not merely that a tort claim is the subject of the potential default judgment. It does not appear that

information and belief and counsel believes it to be true, the latter not being permitted personal knowledge testimony under the Federal Rules of Evidence.

Counsel first testifies that she is attaching an Index of Exhibits that are filed in support of the Motion. Declaration, ¶ 3; Dckt. 149. Counsel then authenticates exhibits:

Exhibit A - Counsel states that it includes the complaints filed in this Adversary Proceeding

A-1 is the Complaint filed by Plaintiff in *Pro Se* on November 13, 2018.

A-2 is the First Amended Complaint filed on April 3, 2019 that is now before the court.

A-3 is a document titled First Amended Complaint dated February 5, 2019 that is signed by Plaintiff in *Pro Se* but was never filed with the Court.

Exhibit B - Counsel states are documents relating to the Marin Litigation. Counsel does not state what personal knowledge basis she has to authenticate these documents. See Fed. R. Evid. 901 et seq.

B-1 Marin Litigation first amended complaint filed February 2, 2009.

B-2 Marin Litigation Court Docket indicating that the Marin Litigation was Disposed in Entirety February 19, 2010.

B-3 First page of the original complaint filed by Plaintiff in the Marin Litigation.

B-4 The Entry of Judgment in the Marin Litigation.

Counsel then testifies that Plaintiff claimed in the Marin Litigation a personal claim for damages, which is the same as in this Adversary Proceeding. Declaration ¶ 5.

Counsel then states that she is merely informed and believes, but will state under penalty of perjury, which must be based on her personal knowledge (Fed. R. Evid. 601, 602) that the State Court did not scrutinize Plaintiff's state court pleadings, the damages were also not scrutinized.

Exhibit C - Interrogatories propounded by Defendant-Debtor Representative and Responses thereto by Plaintiff

Exhibit D - Documents produced by Plaintiff in response to a production request for identification of the accounts from which monies were transferred that were the source of the damages for what is not a final judgment in the Marin Litigation.

Exhibit E - A declaration of James Turano in the Marin Litigation. Counsel again states that she is information and believes, but has no personal knowledge, that these relate to representations made by Plaintiff in prosecuting an insurance claim.

Exhibit F - A screen shot of the San Diego Superior Court Judgment Calculator through

August 9, 2018, the date Debtor commenced his bankruptcy case. This picture is to show what the Calculator calculated the judgment to be based on information placed in it by an unidentified person.

Exhibit G - Counsel identifies that as a July 31, 2007 letter to Debtor from Plaintiff in which Counsel states that she reads (hears) it to say that Plaintiff has no contract with Debtor.

Exhibit H - Counsel states this to be the Lease Assignment.

Exhibit I - Counsel states that this is a declaration of Plaintiff seeking to continue the trial in the "FFIC litigation." Counsel states that she is informed and believes, but has no personal knowledge, that this was because Plaintiff's counsel was seeking to withdraw from that "FFIC litigation."

Exhibit J - Counsel states that these are communications to or about Plaintiff concerning the Vehicle.

Exhibit K - Counsel states that this is a transfer document from 1999 stating that it is from the seller to "D. Black for IIT Pro."

Exhibit L - Counsel identifies this as the 3rd Amended Notice of Deposition. She states that the deposition of Plaintiff was interrupted multiple times by Plaintiff.

Exhibit M - Counsel identifies these as documents produced by Defendant-Debtor Representative in response to Plaintiff's production demand.

Exhibit N - Counsel identifies these as excerpts from a deposition in the Marin Litigation. She is informed and believes, and states her conclusion based on such information and belief, that Plaintiff is barred from pursing any claims against Debtor.

Exhibit O - Counsel identifies this as a transfer document from 1999 for the Vehicle, which Plaintiff signed on behalf of IIT Pros.

OPPOSITION

Plaintiff has filed his Opposition, asserting that Issue Preclusion applies in Plaintiff's favor, or does not apply at all. Plaintiff files his Declaration attesting to various facts, including the granting of the Marin Litigation Judgment for his fraud and embezzlement claims. Declaration, Dckt. 168. He also provides testimony as to the alleged underlying facts upon which he asserts his claims for fraud and embezzlement - to the extent that they have not already been adjudicated in the Marin Litigation.

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for

summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

APPLICATION OF ISSUE PRECLUSION TO A STATE COURT JUDGMENT

The bankruptcy court may give preclusive effect to a state court judgment as the basis for excepting a debt from discharge. *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir. 2001). The court applies the forum state's law of issue preclusion. *Id.* Here, as was the case in *Harmon*, California is the relevant state law and under California law issue preclusion is only appropriate when five threshold factors are met : (1) the judgment is final; (2) the issue(s) are identical; (3) the proceeding was actually litigated; (4) the issue was necessarily decided in the former proceeding; and (5) the parties are the same or were in privity. *Id.* at 1245; *see also In re Riley*, 2016 WL 3351397, at *4 (B.A.P. 9th Cir. June 8, 2016) (*citing DNK Holdings, LLC v. Faerber,* 61 Cal.4th 813, 825 (2015)).

Moreover, the court is not required to apply issue preclusion even if the five threshold factors are met because the court is also charged with determining whether issue preclusion "furthers the public policies underlying the doctrine." *In re Harmon*, 250 F.3d at 1245 (citing *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342–42 (1990)). In short, the decision to apply issue preclusion is discretionary

The party asserting issue preclusion "carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007).

DENIAL OF DISCHARGE LAW

Debt for False Pretenses, False Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

> 11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate five elements:
>
> (1) the debtor made ... representations;
>
> (2) that at the time he knew they were false;
>
> (3) that he made them with the intention and purpose of deceiving the creditor;
>
> (4) that the creditor relied on such representations; [and]
>
> (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz,* 523 U.S. 213, 215 (1998).

Debt for Embezzlement or Larceny –
11 U.S.C. § 523(a)(4)

In section 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny." Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

The Ninth Circuit Court of Appeals laid out the elements for nondischargeability based on embezzlement in *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551 (9th Cir. 1991).

> Under federal law, embezzlement in the context of nondischargeability has often been 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." *Moore v. United States*, 160 U.S. 268, 269, 40 L. Ed. 422, 16 S. Ct. 294 (1885). 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." *In re Hoffman,* 70 Bankr. 155, 162 (Bankr. W.D. Ark. 1986); *In re Schultz*, 46 Bankr. 880, 889 (Bankr. D. Nev. 1985).

Littleton v. Transamerica Com. Fin, 942 F.2d at 555.

As discussed in COLLIER ON BANKRUPTCY, a nondischargeable larceny is the wrongful taking of the property of another with the intent to convert the property to the taker's use without the consent of the owner of the property. 4 COLLIER ON BANKRUPTCY (SIXTEENTH EDITION) P 523.10[2]. The main difference between a larceny and an embezzlement is that the initial taking is wrongful for the larceny, while with the embezzlement the taker does not improperly obtain possession, but the wrongful act subsequently occurs. *Id.* As stated by the Ninth Circuit Court of Appeals in *Ormsby v. First America Title Company (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010), a court is not bound by state law on what constitutes larceny, but *may* follow state law.

> Section 523(a)(4) prevents discharge "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). "For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a 'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.' " 4 Collier on Bankruptcy P 523.10[2] (15th ed. rev. 2008).

Id. at 1205. The Ninth Circuit then stated that it was not determining that there is a "fraudulent intent" requirement for a larceny to be nondischargeable, which is what the debtor in that case was arguing. The Ninth Circuit concluded:

> We make no determination concerning whether federal law requires a finding of fraudulent intent for larceny as Ormsby contends. Were we to find that larceny required fraudulent intent, the state court judgment would provide enough information to determine that the court found that his actions amounted to fraud, because "[i]ntent may properly be inferred from the totality of the circumstances and the conduct of the person accused." *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 904 (7th Cir. 1991). The totality of the circumstances as described in the state court's findings of fact make clear that Ormsby acted with fraudulent intent. . . .

Id.

Under California Law, the crime of theft (larceny renamed theft in 1927; RUTTER GROUP-CALIFORNIA CRIMINAL LAW, § 8:1.LARCENY) occurs as defined in California Penal Code § 484 (emphasis added) when a person:

> [w]ho shall feloniously **steal, take, carry, lead, or drive away** the personal property of another, or who shall **fraudulently appropriate property which has been entrusted** to him or her, or who shall **knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money**, labor **or real or personal property**, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, **is guilty of theft**.

The elements of theft (larceny) are stated in the RUTTER GROUP-CALIFORNIA CRIMINAL LAW

treatise as follows:

> § 8:2. Larceny—Essential elements of larceny
>
> There are four essential elements of the crime of larceny:
>
> 1. A taking;
>
> 2. Of the personal property of another;
>
> 3. Asportation of the property taken; and
>
> 4. The taking was done, without claim of right, to deprive the owner of his or her property permanently.[1]
>
> The offense of theft by larceny is committed by a person who: (1) takes possession; (2) of personal property; (3) owned or possessed by another; (4) by means of trespass; (5) with intent to steal the property; and (6) carries the property away.[2] A leasehold interest is property subject to the theft statute.[3] The act of taking personal property from another's possession is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property.[4]
>
> Consent procured by fraud is invalid, and the resulting offense is commonly called larceny by trick and device.[5] The intent to steal is the intent, without a good faith claim of right, to permanently deprive the owner of possession. If the taking has begun, the slightest movement of the property constitutes a carrying away or asportation.[6]
>
> The jury instruction for theft by larceny lists three elements: (1) a person took personal property of some value belonging to another; (2) when the person took the property he or she had the specific intent to deprive the other person permanently of the property; (3) the person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property.[7] These elements are further discussed in §§ 8:3 to 8:11, below.

RUTTER GROUP-CALIFORNIA CRIMINAL LAW § 8.2 (footnote citations to California case law omitted).

Only personal property can be the subject of theft (larceny). *Id.*, § 8:5. The mere fact that someone is a co-owner or partner with the victim does not mean that the improper taking is not a theft (larceny). *Id.*, § 8:8.

Debt for Willful and Malicious Injury –
11 U.S.C. § 523(a)(6)

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby),* 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his

own conduct." *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the 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) (internal citations omitted).

For a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the "ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

FINAL RULINGS

4. **20-21275-E-7 GARRETT BOSSIO** **PRE-TRIAL CONFERENCE RE: COMPLAINT**
20-2127
LAVOIE V. BOSSIO **7-2-20 [1]**

Final Ruling: No appearance at the May 27, 2021 Pre-Trial Conference is required.

Plaintiff's Atty: Pro Se
Defendant's Atty: Matthew J. DeCaminada

Adv. Filed: 7/2/20
Answer: 7/22/20

Nature of Action:
Recovery of money/property - other
Objection/revocation of discharge
Dischargeability - false pretenses, false representation, actual fraud
Discharge ability - willful and malicious injury

Notes:
Scheduling order -
Initial disclosures by 10/15/20
Disclose expert witnesses by 12/30/20
Close of discovery 4/23/21
Dispositive motions heard by 4/23/21

Stipulation to Continued Pre-Trial Conference filed 5/17/21 [Dckt 16]; requests pre-trial conference be continued to 6/17/21 at 11:00 a.m.

> **The Status Conference is continued to 11:00 a.m. on June 17, 2021,** the Parties reporting (Status Report, Dckt. 16) that all issues in this Adversary Proceedings have been resolved by a settlement.

May 27, 2021 Pre-Trial Conference

The Parties filed a Settlement agreeing to the dismissal with prejudice of this Adversary Proceeding. Dckt. 17. The court continues the Pre-Trial Conference as a calendar management tool pending entry of the order dismissing this Adversary Proceeding.