

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 11, 2019 at 11:00 a.m.

1.	<u>18-25001</u> -E-7 JOSEPH AKINS <u>18-2187</u> RLF 4 BLACK V. AKINS	MOTION TO DISMISS ADVERSARY PROCEEDING 5-23-19 <u>[37]</u>
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Also Item 2 - Status Conference

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 on May 23, 2019. By the court's calculation, 49 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 denied without prejudice.
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The Defendant in this Adversary Proceeding, Joseph H. Akins ("Defendant") moves for the court to dismiss all claims against it in the Plaintiff, Dominique Black's ("Plaintiff"), Complaint according to Federal Rule of Civil Procedure 12(b)(6).

The Motion states the following grounds for relief with particularity (FED. R. BANKR. P. 9013):

1. Each cause of action in the Complaint fails to allege the required elements with specificity.
2. Each cause of action is facially implausible and contradicted internally.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition to the Motion on June 26, 2019. Dckt. 43. Plaintiff opposes the Motion on the following grounds:

1. The Motion fails to state with particularity the factual and legal grounds in violation of the Local Bankruptcy Rules.
2. The Memorandum of Points and Authorities was 11 pages but does not include a table of contents and authorities.
3. Plaintiff properly alleged its claims in the Complaint.

DEFENDANT'S REPLY

Defendant filed a Reply to the Opposition on July 3, 2019. Dckt. 45. Defendant's Reply argues the following:

1. The Complaint fails the requirement for well pled factual allegations.
2. During a state court cause of action Plaintiff sought contract and not tort damages.
3. The Complaint does not allege all required claim elements.
4. The Complaint is alleged against multiple parties but does not identify their roles in a fraudulent scheme.
5. Movant consents to the court's resolution of disputed material factual issues pursuant to Federal Rule of Civil Procedure 43(c) made applicable by Federal Rule of Bankruptcy Procedure 9017.

Defendant also filed the Declarations of Sheila Gropper Nelson and Joseph Akins to establish factual allegations. Dckts. 46, 47. Defendant advances this Motion into a factually determined matter, much like a motion for summary judgment or a trial.

APPEARANCE OF COUNSEL FOR DEFENDANT

On the Motion to Dismiss, counsel of record for Defendant Joseph H. Akins is stated to be, "Sheila Gropper Nelson," of the Resolution Law Firm. Dckt. 37, p. 1, upper left hand corner of the page. However, on the Declaration of Ms. Nelson filed in Reply to the Opposition, counsel is identified as "Specially appearing." Dckt. 46, p. 1, upper left hand corner of the page. This "specially appearing" designation is also made by Ms. Nelson on the Declaration of Joseph Akins which she filed as part of the

Reply. Dckt. 47, p. 1, upper left hand corner.

As provided in the Local Bankruptcy Rules of the District Court for the Eastern District of California and incorporated into the Local Bankruptcy Rules in this District, except as a courtesy appearance in a criminal matter or as another attorney in the same firm as counsel of record, an attorney appearing in federal court is, and must be the attorney of record, and not merely “specially appearing” as a limited or otherwise not an attorney of record. E.D. Cal. L.B.R. 182, Bankr. E.D. Cal. L.B.R. 2017-1. FN. 1.

FN. 1. This is without limit to the extent which under Federal Rule of Civil Procedure 12 a “special appearance” can be made to challenge in personal jurisdiction without waiving such by appearing for such motion. See Fed. R. Civ. P. 12(b), stating, “No defense or objection [which includes lack of personal jurisdiction] is waived by joining it with one or more other defenses or objections in a responsive pleading or motion [which is required under Rule 12(b)].”

DISCUSSION

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. See 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the “state with particularity” requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use

of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Grounds Stated in Motion

Movant has not provided any grounds, merely unsupported conclusions of law. The Motion in its entirety states the following with particularity:

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The grounds for said Motion, pursuant to Federal Rule of Bankruptcy Procedure, are that each of the identified Causes of Actions (1 to 4) fail to allege the requisite elements with the required specificity to state causes of actions; are each facially implausible, are all contradicted internally as well as by matter either before this Court or as may be judicially noticed by the Court and that amendment can not cure the defects. The Motion is brought pursuant to Federal Rule of Bankruptcy Procedure Rule 7012 et seq., the controlling case law and local rules as applicable. The motion is supported by the pleadings and papers filed in support hereon and such other and further grounds and matter as the Court allows.

Counsel will appear in the U.S. Bankruptcy Court, for the Eastern District of California, at the 501 I Street Sacramento California before the Honorable Judge Ronald Sargis in Courtroom 33, 6th Floor, to be heard on notice motion calendar.

Opposition to said Motion, if in writing, must be timely filed, (14 days before hearing), pursuant to local rules. Failure to file a timely written opposition to said Motion could result in the Court awarding the relief prayed for by the Motion and Defendant/Debtor. (See Local Rules Rule 7004-1 & 9014-1 (d)(3)(B)(I) & (ii)) within the time required. Failure to do so may result in a default being entered by the Court.

The Motion states the Complaint fails to allege requisite elements for its claims, but does not state what the claims are, what is required to be alleged, and what elements were not actually alleged.

Similarly, the Motion states the claims of the Complaint are facially implausible, but there is no explanation why those claims are implausible.

Defendant later filed a Reply which included more detailed argument. However, as discussed at length, the Federal Rules of Bankruptcy Procedure require the motion to state with particularity the grounds for relief. Defendant cannot supplement this defect through a reply.

Additionally, the court notes that Defendant filed evidence along with the Reply and purported to consent to this court's factual determination based on affidavits. However, 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).

Based on the foregoing, the Motion is denied without prejudice.

The court shall issue a minute 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 the defendant, Joseph H. Akins (“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 denied without prejudice.

IT IS FURTHER ORDERED that an answer or other properly prepared responsive pleading and supporting pleadings shall be filed and served on or before **xxxxx, 2019**.

2.	<u>18-25001-E-7</u> JOSEPH AKINS <u>18-2187</u> BLACK V. AKINS	STATUS CONFERENCE CONTINUED RE: AMENDED COMPLAINT 4-4-19 [21]
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The Status Conference is xxxxxxxxxxxxxxxxxxxxxxxx
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JULY 11, 2019 STATUS CONFERENCE

A motion to dismiss the Amended Complaint was filed by Joseph Akins, the Defendant-Debtor. Due to procedural and substantive issues, that Motion was denied without prejudice. Plaintiff Dominique Black is now represented by counsel.

Summary of First Amended Complaint

The First Amended Complaint (“FAC”) was filed on April 4, 2019. Dckt. 21. The allegations in the First Amended Complaint include the following:

- A. Plaintiff was the owner of a 1977 Classic GMC Motorhome (“Vehicle”). FAC ¶ 8.
- B. Defendant-Debtor, along with others, fraudulently conspired to deprive Plaintiff of the value of the Vehicle and monies advanced for restoration of the vehicle. *Id.*

- C. Defendant-Debtor was represented to be a GMC licensed facility specializing in restoring motorhomes such as the Vehicle and were skill in such restorations. FAC ¶ 12.
- D. The above representations were false. FAC ¶ 13.
- E. Plaintiff and Defendant-Debtor entered into an oral agreement in 1999 for Defendant-Debtor to restore the Vehicle. FAC ¶ 16.
- F. Between 2000 and 2006 Plaintiff and Defendant-Debtor entered into a series of oral amendments (which are not specified) due to changes and delays. FAC ¶ 18.
- G. Plaintiff advanced \$147,622.75 to Defendant-Debtor and his associates based on invoices presented for restoration work done on the Vehicle. FAC ¶ 21.
- H. In January 2006, a representative of Defendant-Debtor's associate in the restoration project "admitted" that the invoices had been fraudulent and that the monies advanced for the work had been "embezzled" through the use of the fraudulent invoices. FAC ¶ 29.
- I. In June 2006, Plaintiff was informed that Defendant-Debtor's brother was living in the Vehicle and using it as a drug manufacturing facility. FAC ¶ 31.
- J. It is alleged that Defendant-Debtor and his associates made the misrepresentations to not only obtain the monies for the restoration, which was not made, but to have the use and occupancy of the Vehicle. FAC ¶¶ 32, 33.
- K. Defendant-Debtor and his associates have refused to turn over the Vehicle to Plaintiff. FAC ¶ 39.
- L. When Defendant-Debtor's lease of the business premises on which the Vehicle was located, Plaintiff arranged with the landlord to obtain possession of the Vehicle and remove from said premises. FAC ¶ 41.
- M. It is alleged that Defendant-Debtor learned of the above arrangement to obtain possession of the Vehicle, and thereon vandalized, damaged, and stripped the Vehicle of remaining valuable parts. FAC ¶ 42.
- N. Defendant-Debtor then abandoned the Vehicle on a public roadway, leaving in in an inoperable and dismantled state. FAC ¶ 43.
- O. Defendant-Debtor vandalized the Vehicle by spilling or pouring paint on it, leaving waste in the Vehicle, and using the Vehicle to manufacture narcotics. FAC ¶ 44.
- P. Plaintiff obtained a judgment against Defendant-Debtor and his associates in state court in the amount of \$323,804.85. Claims for fraud, breach of contract, and common counts were stated in the state court complaint. FAC ¶¶ 45, 46.

- Q. As of commencement of the bankruptcy case the judgment obligation owed by Debtor was not less than \$193,612.97, plus costs. FAC ¶ 49.
- R. The obligation on the state court judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) because:
1. Defendant-Debtor and his associates falsely represented that they were a registered, licensed GMC repair and restoration facility.
 2. Defendant-Debtor and his associates falsely represented that they possessed licenses required to operate the repair facility and work on the Vehicle.
 3. Defendant-Debtor made multiple false representations regarding the status of the Vehicle and restoration work being done during the period between 1999 and 2006.
 4. The false representation included purported purchase of parts and restoration work on the Vehicle.
 5. The false representations were made to induce Plaintiff into paying Defendant-Debtor and his associates for the work misrepresented to have been done and to procure further payments, while retaining possession of the Vehicle, which was used as a residence and drug manufacturing lab by them or their associates.
 6. Plaintiff relied on the Defendant-Debtors and his associates misrepresentations, making payments to Defendant-Debtor for said misrepresented parts purchases and purported restoration work.
 7. Plaintiff's damages from such misrepresentations is not less than \$193,612.97.

FAC ¶¶ 51-62.

- S. The obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(4), embezzlement, because:
1. Plaintiff is the owner of the Vehicle.
 2. Plaintiff entrusted the Vehicle to Defendant-Debtor and his associates to do the restoration work on the Vehicle which was represented to be done by them.
 3. Defendant-Debtor and his associates retained possession of the Vehicle and refused to return it to Plaintiff when he demanded its return.
 4. Defendant-Debtor and his associates wrongfully retained the Vehicle

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for their own use as a residence and as a drug manufacturing lab.

5. Defendant-Debtor and his associates removed parts and materials from the Vehicle for their own, personal use.
6. Plaintiff paid Defendant-Debtor and his associates for additional parts, which, to the extent purchased, were taken by Defendant-Debtor and his associates for their own, personal use.
7. Defendant-Debtor's and his associate's taking of the vehicle, parts and materials from the vehicle, and the additional parts purchased with Plaintiff's monies have damaged Plaintiff in an amount not less than \$193,612.97.

FAC ¶¶ 65-76,

T. Plaintiff asserts that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(4), larceny, because:

1. Plaintiff is the owner of the Vehicle.
2. Defendant-Debtor and his brother took possession of the Vehicle without Plaintiff's permission.
3. Defendant-Debtor refused to deliver possession of the Vehicle to Plaintiff as demanded.
4. Defendant-Debtor was not in rightful or lawful possession of the Vehicle, that Defendant-Debtor dismantled and took parts from the Vehicle, and used or sold said parts for his own, personal benefit.
5. Defendant-Debtor has wrongfully taken and retained possession of the Vehicle against Plaintiff's rights and interests as owner of the Vehicle.
6. Defendant-Debtor wrongfully took parts, monies for parts, and the Vehicle, causing Plaintiff damages of not less than \$193,612.97.

FAC ¶¶ 78-88.

U. Plaintiff asserts that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(6), because:

1. Plaintiff is the owner of the Vehicle.
2. The Vehicle was entrusted to Tirpak under the terms of an oral contract to provide restoration work to the Vehicle.
3. Defendant-Debtor was not a co-owner of Tirpak's restoration business.

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4. Defendant-Debtor and his brother took possession and control of the Vehicle from Tirpak without the authorization of either Tirpak or Plaintiff.
5. Defendant-Debtor refused to return possession of the Vehicle when demanded by Plaintiff.
6. Defendant-Debtor removed parts from the Vehicle and parts which were purchased for the Vehicle by Plaintiff, and used or sold such parts for Defendant-Debtor's personal benefit.
7. Defendant-Debtor's conduct was willful, with Defendant-Debtor having full knowledge that Plaintiff owned the Vehicle, and knew that his conduct was damaging Plaintiff's interest in the Vehicle and parts.
8. Defendant-Debtor continued in the willful conduct, aware of the damage it was causing Plaintiff, and refused to deliver possession of the Vehicle to Plaintiff. In response to demands to return possession of the Vehicle, Defendant-Debtor made demands for releases and payments to Defendant-Debtor.
9. The conduct of Defendant-Debtor was malicious, with the conversion of the Vehicle and parts being wrongful and intentional, with such acts causing the injury to Plaintiff.
10. Further, Defendant-Debtor had no just cause or excuse for the wrongful and intentional acts, and was aware of his conduct being wrongful and intentional by demanding waivers and release of liability for such conduct, as well as the payment of monies for the release of Plaintiff's Vehicle.
11. The damages cause to Plaintiff for the above conduct is not less than \$193,612.97.

FAC ¶¶ 92-105.

V. Plaintiff asserts that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) because:

1. Plaintiff is the owner of the Vehicle.
2. The Vehicle was entrusted to Defendant-Debtor and Tirpak for restoration and customization.
3. While entrusted to Defendant-Debtor and Tirpak, Defendant-Debtor vandalized and damaged the Vehicle by:

- a. Intentionally spilling paint on the Vehicle,
 - b. Intentionally removing parts from the Vehicle,
 - c. Manufacturing drugs in the Vehicle,
4. Defendant-Debtor's wrongful acts damaged the Vehicle.
5. Defendant-Debtor continued in the willful conduct, aware of the damage it was causing Plaintiff, and refused to deliver possession of the Vehicle to Plaintiff. In response to demands to return possession of the Vehicle, Defendant-Debtor made demands for releases and payments to Defendant-Debtor.
6. The conduct of Defendant-Debtor was malicious, with the conversion of the Vehicle and parts being wrongful and intentional, with such acts causing the injury to Plaintiff.
7. Further, Defendant-Debtor had no just cause or excuse for the wrongful and intentional acts, and was aware of his conduct being wrongful and intentional by demanding waivers and release of liability for such conduct, as well as the payment of monies for the release of Plaintiff's Vehicle.
8. The damages cause to Plaintiff for the above conduct is not less than \$193,612.97.

FAC ¶¶ 108-118.

A copy of the State Court Judgment is attached to the First Amended Complaint as Exhibit 4. Dckt. 21 at 42-43. The judgment was entered on the default of the defendants, including the Defendant-Debtor, and after the state court considered Plaintiff's evidence and declaration. State Court Judgment ¶ 1.e.

No findings of fact or conclusions of law are stated by the state court judge, and the State Court Judgement does not state what claims - contract, fraud, common count - it is based.

At the Status Conference, XXXXXXXXXXXXXXXXXXXXXXXXXXXX

JANUARY 9, 2019 STATUS CONFERENCE

Plaintiff did not appear at the Status Conference. The court continues the Status Conference and

shall issue an Order to Show Cause as to why this Adversary Proceeding should not be dismissed due to a lack of prosecution.

Summary of Complaint

Dominique Black, the Plaintiff, has filed this Adversary Proceeding in *pro se* seeking both a determination that the obligation of Joseph Akins, Defendant-Debtor, is nondischargeable and that Defendant-Debtor's discharge should be denied in his underlying bankruptcy case. The Complaint states the following grounds and relief sought:

1. Plaintiff is a judgment creditor, with a Superior Court judgment determining that Defendant-Debtor is obligated to her in the amount of \$323,804.85. A copy of the Judgment is filed as Exhibit A to the Complaint.

A. The State Court Judgment was entered by the State Court based on Defendant-Debtor's default on February 19, 2010.

B. The State Court Judgment is in the amount of \$323,804.85.

2. The State Court Complaint sought relief for alleged fraud. A copy of the State Court Judgment is attached as Exhibit B to the Complaint.

A. Exhibit B is not a copy of the State Court Complaint, but of one page, titled "First Cause of Action Fraud.

B. Reference is made to other attachments to the State Court Complaint, with are not included as part of Exhibit B.

3. It is then alleged that the State Court Judgment was entered based on an Amended State Court Complaint, which is attached as Exhibit C to the Complaint.

A. The Amended Complaint alleges causes of actions identified as:

- (1) Breach of Contract
- (2) Common Counts
- (3) Fraud

B. Attached to the Amended Complaint are detailed identification of the acts alleged to be the basis for a fraud cause of action. It also includes detailed allegations for a breach of contract and common count causes of action.

The State Court Judgment does not include any findings or determinations upon which Cause, or Causes of Action, relief was granted.

4. The Complaint alleges that the State Court Judgment is nondischargeable based on fraud pursuant to 11 U.S.C. § 523(a)(2)(A).

5. The Complaint further alleges that Defendant-Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4)(A) [Defendant-Debtor making a false oath or account] and (C) [Defendant-Debtor giving/receiving/offering money/property/advantage for acting or forbearing to act].

The Complaint does not allege what acts and grounds state a basis for such claim, but merely direct the court to Exhibits A and C.

SUMMARY OF ANSWER

No Answer has been filed by Defendant-Debtor Joseph Akins.

SERVICE OF SUMMON AND COMPLAINT

No Certificate of Service has been filed by Plaintiff documenting proper service of the Summon and Complaint in this Adversary Proceeding.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that the Adversary Proceeding is a core proceeding matter pursuant to 28 U.S.C. § 157(b)(2). Though not expressly stated in the Complaint, Federal Court jurisdiction exists for determination of the dischargeability of debt and denial of discharge , and that this is a core proceeding pursuant to 28 U.S.C. § 1134 and the referral of these bankruptcy matters to this court by the United States District Court of the Eastern District of California pursuant to 11 U.S.C. § 157.

3. [10-27435-E-7](#) **THOMAS GASSNER**
[19-2038](#)
GASSNER V. GASSNER ET AL

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
3-12-19 [1]

JULY 11, 2019 STATUS CONFERENCE

No further pleadings or reports have been filed since the May 29, 2019 Status Conference. The court continued the Status Conference, as discussed below, to allow the Parties to hone their claims and determine the rights and issues for which they had standing.

At the July 11, 2019 Status Conference, **XXXXXXXXXXXXXXXXXXXX**

MAY 29, 2019 STATUS CONFERENCE

At the Status Conference the court addressed with the Parties the claims asserted by the Plaintiff, the successor to the Debtor, asserting violations of the automatic stay as it applies to property of the bankruptcy estate, for events that occurred after Debtor obtained his discharge. Defendants Alfred and Carol Gassner, discussed their assertion that because the underlying rights relate to a trust, and that a trust proceeding is in the nature of a probate, it was incumbent on the federal court to abstain to allow all disputes be adjudicated by a state court judge.

The court addressed with the Parties the issue of standing with respect to claims asserted, as well as the proper application of 28 U.S.C. § 1334(e), exclusive federal court jurisdiction over property of the bankruptcy estate, and appropriate exercise of discretionary abstention under 28 U.S.C. § 1334(c)(2). The issue of abstention will be addressed when raised by the appropriate motion. As to standing, the Chapter 7 Trustee is prosecuting her separate action asserting violation of the automatic stay as to property of the bankruptcy estate, and did not “weigh in” on the appropriateness of the successor to the Debtor asserting claims for the same violation of the automatic stay.

Defendants Gassner stated that they had prepared and would be filing a Motion for Summary Judgment. The court addressed with the Parties whether such Motion would be necessary, and whether in the alternative Plaintiff wanted to reconsider what claims it was asserting, what theories Plaintiff could have for asserting independent claims from the bankruptcy estate, in which all of the trust interests and rights sit, and what rights the beneficiary of a trust could assert against a third-party that the beneficiary asserts damaged property of the trust for which the trustee of the trust could not recover damages (such as attorney’s fees incurred by the trust, but there was no legal basis for recovering attorney’s fees by the trust from the third-party).

The court continues the Status Conference to allow Plaintiff to hone the legal theories and claims and rights of Plaintiff that will be asserted against the defendants. This affords counsel for

Plaintiff and the attorneys for the several defendants to meet and confer before the launching of a summary judgment motion.

Joint Status Conference Statement

On May 16, 2019, the Parties filed a Joint Status Conference Statement and Discovery Plan. Dckt. 12. The Plaintiff and Strombom Defendant have agreed on the following discovery and motion schedule:

Non-Medical Expert Witness Disclosure.....July 15, 2019
Exchange of Non-Medical Expert Witness Reports.....September 16, 2019

Medical Expert Witness Disclosure and Reports.....60 days Before Close of
Discovery

Close of Discovery.....December 20, 2019

Dispositive Motions Hearing Deadline.....February 28, 2020

Pretrial Conference.....TBD March 2020

The Settlor Defendants assert that additional discovery time is required given the heft of the Complaint and claims for actual and punitive damages, as well as injunctive relief.

The Joint Status Reports also states that Settlor Defendant asserts the following (as stated in the Joint Status Report):

The Court should take into account that Plaintiff has filed a fourteen (14) page, one hundred twenty (120) paragraph Complaint alleging five (5) causes of action, in which Plaintiff asks for actual, compensatory and punitive damages, as well as injunctive relief, **all of which could require abstention or remand to state court to resolve.**

Joint Status Report, p. 3:13-16 (emphasis added for relevant text).

The court is unsure of what required abstention or “remand” would be required. This Adversary Proceeding has not been removed from state court, so there is nowhere to “remand” the action.

As far as required abstention, Congress has created exclusive federal court jurisdiction for all property of the bankruptcy estate. 28 U.S.C. § 1334(e). This includes determining what is property of the bankruptcy estate. Congress has also given federal judges in bankruptcy cases the discretionary power to abstain if the court determines that such determination can be “timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2).

At the Status Conference the Parties addressed the point raised by Settlor Defendant that resolution of the various claims in the Complaint “require” abstention or remand.

Necessary Parties

As the Supreme Court addressed in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), a federal judge does not grant relief merely because someone asks for it. While the court has to rely on the parties to present the evidence from which findings of fact are to be made, the court is responsible for getting the law right - notwithstanding what is presented by the parties (just as an appellate court conducts *de novo* review of a trial court's legal conclusions).

The court has been presented with a Complaint in which the successor to the post-discharge Debtor asserts that the automatic stay was violated. Such would be violations of the automatic stay as it applies to the Debtor or rights the Debtor acquired upon the closing of the bankruptcy case which Debtor could assert.

As the Parties have noted, Kimberly Husted, the Chapter 7 Trustee in Debtor's bankruptcy case, has commenced her own adversary proceeding, 19-2006, against the Settlor Defendant and MEPCO (these terms are defined below). The Trustee's Complaint seeks the turnover of the Parents Trust Property (defined term below) and claims for violation of the automatic stay as it relates to such property of the Bankruptcy Estate in the Debtor's case.

To the extent that claims are being asserted in this Adversary Proceeding for alleged violations of the automatic stay as it applies to property of the Bankruptcy Estate in Debtor's Chapter 7 case, the court puts to the Parties whether the Chapter 7 Trustee is a necessary party to any adjudication of such rights in this Adversary Proceeding.

SUMMARY OF COMPLAINT

Georgene Gassner ("Plaintiff") has filed a Complaint seeking Sanctions for Violation of the Automatic Stay (Counts 1 and 2), Breach of Fiduciary Duty (Count 3), Judgment that Court Action is Void (Count 4), and Injunctive Relief (Count 5), which Complaint is summarized as follows:

- A. Plaintiff is the surviving spouse of Debtor Thomas Gassner and is the Successor Trustee of the Thomas Gassner and Georgene Gasser Family Trust ("Family Trust").
- B. Carol L. Gassner and Alfred Gassner ("Settlers") are the settlors of the Thomas A. Gassner Trust ("Parents Trust").
- C. Laura Strombom ("Strombom") is the Trustee of the Parents Trust Thomas Gassner Trust.
- D. Plaintiff alleges that Strombom worked for MEPCO Label Systems ("MEPCO").
- E. The Parents Trust was created for the benefit of Debtor. The corpus of the Parents Trust included 2,000 shares of MEPCO common stock.
- F. Debtor worked for MEPCO, including serving as its president. Plaintiff also worked at MEPCO.

- G. Debtor filed bankruptcy on March 25, 2010, and it is alleged that based on advice of counsel Debtor did not disclose his interest in the Parents Trust.
- H. Debtor received his Chapter 7 discharge on July 12, 2010, with his bankruptcy case being closed on May 11, 2011.
- I. The undisclosed interest in the Parents Trust continued to be an asset of the bankruptcy estate notwithstanding the closing of Debtor's bankruptcy case.
- J. Debtor and Plaintiff left employment at MEPCO in 2010, and the relationship with Settlers had turned acrimonious.
- K. On July 2, 2016, Debtor turned 50 years old, at which point he was entitled to receive the assets from the Parents Trust.
- L. On June 7, 2016, Settlers commenced a State Court Action to modify the Parents Trust and suspend distributions.
- M. It is alleged that Strombom participated in Settlers' attempt to change the Trust as part of an attempt to deprive Debtor of the assets from the Parents Trust.
- N. It is asserted that the State Court Action was an attempt to obtain possession and control of property of the bankruptcy estate, which was protected by the automatic stay.
- O. Settlers and Strombom were aware of the Debtor's bankruptcy case and the automatic stay when they prosecuted the State Court Action. It is alleged that in the State Court Action Settlers and Strombom expressly asserted that Debtor "failed to properly disclose assets, including his income rights and beneficial interest in the Trust, to creditors when he later filed for person Bankruptcy protection in 2010."
- P. Strombom did not distribute the Parents Trust assets to Debtor when he turned 50 years old.
- Q. In October 2016, the State Court issued an order suspending distribution of the Parents Trust assets pending resolution of the State Court Action.
- R. It is alleged that thereafter Strombom did not fulfill her fiduciary duties as the trustee of the Parents Trust.
- S. Neither Strombom or the Settlers have turned over the Parents Trust assets to the Chapter 7 Trustee in Debtor's bankruptcy case.
- T. Debtor passed away on October 5, 2017.
- U. Prior to passing away, Plaintiff and Debtor created the Family Trust, which includes Debtor's interests in the Parents Trust.

- V. Notwithstanding notice of the reopened bankruptcy case, Settlers have attempted to conduct discovery in the State Court Action.
- W. It is asserted that Settlers have violated the automatic stay by filing and prosecuting the State Court Action, as well as withholding the distribution of the Parents Trust assets to Debtor.
- X. It is asserted that Strombom violated the automatic stay by filing and prosecuting the State Court Action, as well as withholding the distribution of the Parents Trust assets to Debtor.
- Y. It is asserted that Strombom violated her state law fiduciary duties by failing to distribute the Parents Trust assets to Debtor when he turned 50 years old, whether to the Debtor directly or to the Bankruptcy Estate in his Chapter 7 case.
- Z. Plaintiff seeks a determination that the State Court Action was void because it was in violation of the automatic stay.
- AA. Plaintiff seeks a mandatory injunction requiring Settlers to dismiss the State Court Action.
- BB. The Complaint seeks actual and punitive damages, as well as attorney's fees and costs.

SUMMARY OF STROMBOM'S ANSWER

Laura Strombom ("Strombom Defendant") has filed an Answer admitting and denying specific allegations in the Complaint. Strombom Answer, Dckt. 8.

SUMMARY OF ANSWER

Carol Gassner and Alfred Gassner ("Settlor Defendant") have filed their Answer admitting and denying specific allegations in the Complaint. Settlers Answer, Dckt. 10. The Answer includes seven affirmative defenses.

The Answer also asserts that need not respond to allegations of federal court jurisdiction and that this is a core proceeding. Settlers Answer ¶¶ 1-3, *Id.* As addressed below, the Settlers Defendant must address jurisdiction and core proceeding allegations in a complaint, having an affirmative duty to so do.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint "[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction..." apply to complaints in Adversary Proceedings. In add to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the addition pleading requirement concerning whether

the matters in the complaint are core or non-core:

“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 judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.**”

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

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) [every defense must be asserted in the responsive pleading] applies in adversary proceeding. Fed. R. Bankr. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matter are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

“(b) Applicability of Rule 12(b)-(i) F.R.Civ.P. Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core.** If the response is that the proceeding is **non-core, it shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.”

Fed. R. Bank. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff Georgene Gassner alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 1367, and 157(b)(2), and that Counts 1, 2, 4 and 5 are core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O), and that Count 3 for breach of fiduciary duty is non core for which jurisdiction exists pursuant to the same statutes.. Complaint ¶¶ 1, 3, Dckt. 1.

In her Answer, Defendant Laura Strombom admits the allegations of jurisdiction, that Counts 1, 2, 4, and 5 are core proceedings, and that federal court jurisdiction exists for the claim in Count 3. Answer ¶¶ 1, 3, Dckt. 8.

In their Answer, Defendants Carol Gassner and Alfred Gassner assert that they do not need to respond to the allegations of federal court jurisdiction, core and non-core proceedings, and whether they consent to the bankruptcy judge issuing the final orders and judgment on non-core matters. Answer ¶¶ 1, 3, Dckt. 10.

SCHREIBER V. EVANS ET AL

The Status Conference is XXXXXXXXXXXXXXXX
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JULY 11, 2019 STATUS CONFERENCE

Defendants Mark and Renee Evans filed an Updated Status Report on July 1, 2019. Dckt. 12. In it Plaintiff reports that the Parties met and conferred about this Adversary Proceeding and possible settlement. Further, that Defendants request that the court set a discovery and pre-trial conference schedule to help keep this Adversary Proceeding “on track” for early resolution.

Plaintiff Gazelle Schreiber’s Complaint seeks relief in the form of the court determining that the obligation owed to Plaintiff by Defendants Mark and Renee Evans are nondischargeable pursuant to 11 U.S.C. § 524(a)(2), § 523(a)(4), and § 523(a)(6). These are core matter proceedings as provided for in 28 U.S.C. § 157(b)(2), for which the bankruptcy judge the bankruptcy judge issues all final orders and judgment. To the extent that the proceedings were non-core, Plaintiff expressly consents to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Complaint ¶ 5, Dckt. 1. Defendants Mark and Renee Evans admit that federal court jurisdiction exists pursuant to 28 U.S.C. § 1334 and § 157. The Answer does not specifically state that this is a core matter proceeding. ~~At the July 11, 2019 Status Conference Defendants, and each of them, confirmed on the record that this is a core matter proceedings, and to the extent that any of the claims as stated in the now existing complaint could be construed as non-core, they each consent to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding.~~

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. Plaintiff Gazelle Schreiber’s Complaint seeks relief in the form of the court determining that the obligation owed to Plaintiff by Defendants Mark and Renee Evans are nondischargeable pursuant to 11 U.S.C. § 524(a)(2), § 523(a)(4), and § 523(a)(6). These are core matter proceedings as provided for in 28 U.S.C. § 157(b)(2), for which the bankruptcy judge issues all final orders and judgment. To the extent that the proceedings were non-core, Plaintiff expressly consents to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Complaint ¶ 5, Dckt. 1. Defendants Mark and Renee Evans admit that federal court jurisdiction exists pursuant to 28 U.S.C. § 1334 and § 157. The Answer does not specifically state that this is a core matter proceeding. ~~At the July~~

July 11, 2019 at 11:00 a.m.

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~~11, 2019 Status Conference Defendants, and each of them, confirmed on the record that this is a core matter proceedings, and to the extent that any of the claims as stated in the now existing complaint could be construed as non-core, they each consent to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding.~~

- b. Initial Disclosures shall be made on or before **July 19, 2019**.
- c. Expert Witnesses shall be disclosed on or before -----, **2019**, and Expert Witness Reports, if any, shall be exchanged on or before -----, **2019**.
- d. Discovery closes, including the hearing of all discovery motions, on -----, **2019**.
- e. Dispositive Motions shall be heard before -----, **2019**.
- f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- **p.m. on -----, 2019**.

MAY 29, 2019 STATUS CONFERENCE

On May 20, 2019, Defendant's Counsel filed a Status Report requesting that the court continue the Status Conference to allow the Parties the opportunity to conclude their settlement negotiations. Dckt. 9.

In light of the nature of the Complaint and the Parties being represented by knowledgeable bankruptcy counsel, the Status Conference is continued. Due to scheduling conflicts, the court specially sets the date and time of the Status Conference.

Summary of Complaint

Gazelle Schreiber ("Plaintiff") has filed a Complaint to have the obligation owed to her determined nondischargeable pursuant to 11 U.S.C. § 523(a)(1), (4), and/or (6). Dckt. 1. The allegations in the Complaint are summarized as follows:

1. Plaintiff purchase property from Defendant-Debtor's company.
2. Plaintiff alleges that Defendant-Debtor's and their company failed to disclose known defects in the property sold to Plaintiff.
3. It is alleged that this was a "flip the property sale," in which Defendant-Debtor had been provided information by the engineers of extension foundation damage to the property.

Summary of Answer

Mark Evans and Renee Evans ("Defendant-Debtor") have filed an Answer that admits and denies specific allegations in the Complaint. Dckt. 6.

JULY 11, 2017 STATUS CONFERENCE

This Chapter 11 case was commenced by Herbert Miller, “Debtor,” on May 29, 2019. Mr. Miller currently serves as the Debtor in Possession (“ΔIP”) in this case.

A review of the files of this court discloses that the Debtor commenced a prior Chapter 13 case on October 9, 2019, Case No. 18-26373. The prior case was dismissed on November 7, 2019, for failure to timely file the necessary documents to prosecute a Chapter 13 case. 18-26373; Order, Dckt. 23. The case was not closed until April 2019, when the court denied Debtor’s motion to vacate the order dismissing the prior case.

The Law Office of Allan R. Frumkin, Inc., a creditor of Debtor, filed a Motion to Dismiss this Case. Dckt. 25. It is asserted that the Schedules filed by Debtor do not accurately state his assets and what is now property of the bankruptcy estate.

It is asserted that in Debtor’s 2018 case he lists owning a property on Shadow Court in Auburn. It is asserted that the property was transferred from a James Macklin to the Debtor about three weeks prior to the case. Information about this asset or the transfer of this asset is not disclosed by Debtor.

With respect to the Rayall Court Property, it is asserted that the title to the property has been transferred between entities and person in which Debtor has an interest or control or with which he has a connection.

It is asserted that Debtor has interests in other entities that are not disclosed.

It is further asserted that in his 2018 bankruptcy case Debtor stated under penalty of perjury on his Schedules having personal and household items with a value of \$52,000, but in the current case he now states that the value is only \$4,350.

The Motion also calls into question the percentage ownership interests of Debtor in the disclosed entities, and the basis for there being only “unknown” values. It is also asserted that some of the entities Debtor lists an interest in are not registered with the State of California.

The Motion directs the court back to the 2018 bankruptcy Schedules and Statement of Financial Affairs, in which Debtor states under penalty of perjury having \$10,000 a month in gross income and \$100,000 earned as a Real Estate Consultant. It also notes that from the 2018 case to now, Debtor previously stated having (\$7,830) in month expenses, but now only (\$1,510).

At the Chapter 11 Status Conference, counsel for the ΔIP reported **XXXXXXXXXXXXXXXXXXXX**

SUMMARY OF SCHEDULES

Real Property Schedule A/B	FMV	Debtor's Interest Value	
Rayall Court, Loomis Property - Partial Interest	\$702,050	\$175,512	
NE 391 st Street Washington Property - Partial Interest	\$960,000	\$720,000	

Personal Property Schedule A/B	FMV	LIENS	
2017 Honda Accord	\$16,064		
2018 Nissan Pathfinder	\$23,929		
Cash/Bank Accounts	\$180		
Interests in Non-Publically Traded Entities			
Abacus Investment Group, Inc. 50% interest	Unknown		
203 Gunston, LLC 80% Interest	Unknown		
Chino Whistler, LLC 50% Interest	Unknown		
Earl Palasades, LLC 50% Interest	Unknown		

Secured Claims Schedule D	TOTAL CLAIM AMOUNT	FMV	UNSECURED CLAIM PORTION
CIT Small Business Lending Collateral: Rayall Court Property	(\$2,910)	\$702,050	\$0
Citibank Collateral: Rayall Court Property	(\$194,300)	"	\$0
Gelin Abaci, Inc. Collateral: Rayall Court Property	(\$2,500)	"	\$0
H.R. Blaschkauer Collateral: Rayall Court Property	(\$9,550)	"	\$0
Internal Revenue Service Collateral: Rayall Court Property [Proof of Claim No. 2-1 Filed Asserting (\$110,589) unsecured claim, of which (\$85,107.82) is filed as a priority unsecured claim.]	(\$15,560)	"	\$0
Law Office of Allan R. Frumkin Collateral: Rayall Court Property	(\$17,715)	"	\$0
Honda Financial Collateral: 2017 Honda Accord	(\$18,000)	\$16,064	(\$1,936)
Nissan Financial Collateral: 2018 Nissan Pathfinder	(\$30,000)	\$23,929	(\$6,071)
Wells Fargo Collateral: NE 391 st Street Property	(\$660,000)	\$960,000	\$0

PRIORITY UNSECURED CLAIMS SCHEDULE E	TOTAL CLAIM AMOUNT	PRIORITY	GENERAL UNSECURED
None			

GENERAL UNSECURED CLAIMS SCHEDULE F	TOTAL UNSECURED CLAIMS		
	(\$3,480,000)		

INCOME, SCHEDULE I Total Average Monthly Income		
Net Income From Independent Contractor Business	\$1,500	

EXPENSES, SCHEDULE J Total Average Monthly Expenses	(\$1,510)	
Rent/Mortgage	\$0	
Electricity/Gas	(\$300)	
Water/Sewer/Garbage	(\$150)	
Phone/Cable/Internet	(\$180)	
Food/Housekeeping Supplies	(\$300)	
Clothing	\$0	
Personal Care	(\$50)	
Medical Dental	(\$150)	
Transportation	(\$250)	
Entertainment	(\$100)	
Health Insurance	\$30	
Vehicle Insurance	\$0	

STATEMENT OF FINANCIAL AFFAIRS

Question 4 Income

2019 YTD (Jan-May)	\$0	
2018	\$4,500	
2017	\$17,500	

Question 5 Non-Business Income

2019 YTD	None	
2018	None	
2017	None	

Questions 6, 7 Payments within 90 days

Creditor	Amount	Date
None		

Payments within one year

Creditor	Amount	Date
None		