UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: AUGUST 2, 2022
CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS

RULINGS

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

"**No Ruling**" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"**Tentative Ruling**" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"**Final Ruling**" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("$880," not "$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. 20-23457-A-7 **IN RE: ERNESTO/MARILYN PATACSIL**
20-2167

MOTION TO AMEND
7-1-2022 [79]

CABARDO ET AL V. PATACSIL ET AL
HECTOR MARTINEZ/ATTY. FOR MV.

Tentative Ruling

Motion: Leave to File Amended Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiffs Joseph Cabardo et al. move to amend their adversary proceeding complaint to add a cause of action under Section 523(a)(4). Defendants Patacsil oppose the motion. The defendants have the better side of the argument.

FACTS

Plaintiffs Joseph Cabardo, Donnabel Suyat, Marissa Bibat, Mactabe Bibat, Renato Manipon, Alicia Bolling, Carlina Cabacongan, and John Dave Cabacongan were employees of defendants Ernesto Patacsil and Marily Embry Patacsil. Am. Compl. ¶ 5, ECF No. 8.

In 2012, the plaintiffs filed an action against the defendants in District Court under the Private Attorney General Act for wage and hours violations. *Id.* at ¶ 8. After trial the District Court entered judgment for the plaintiffs in the amount of $893,815. *Id.* at ¶ 9. District Court also awarded attorneys' fees of $1,077,218, *Id.* at ¶ 13, and taxes costs in the amount of $22,862. *Id.* at ¶ 12.

After trial of the District Court action, the defendants filed a Chapter 7 petition. The plaintiffs filed a timely adversary proceeding. Plaintiffs' original complaint alleged the District Court judgment non-dischargeable, 11 U.S.C. § 523(a)(6), (7). Plaintiffs did not plead an exception to discharge under 11 U.S.C. § 523(a)(4).

The pretrial conferenced was scheduled for September 14, 2021, Scheduling Order § 1.0, ECF No. 13; the pretrial conference was re-scheduled to February 1, and then again to June 9, 2022. Notices, ECF No 63, 72. No pretrial order issued.

In between the scheduling order and the continued pretrial conference, the court issued its decision in an unrelated adversary proceeding. *Massioui v. Ardelean*, No. 19-2135 (Bankr. E.D. Cal. October 5, 2021), ECF No. 135. That decision clarified that earned,

but unpaid wages, were property of the employee for the purposes an action against the plaintiff's former employer under 11 U.S.C. § 523(a)(4). *Id.* at pp. 14-16.

Mindful of the factual similarities between *Missioui* and the present action, as well as the authority of the court to issue judgment on issues tried by consent, Fed. R. Civ. P. 15(b)(2); *Consolidated Data Terminals v. Applied Digital Data Systems, Inc*. (9th Cir. 1983) (formal amendment to the complaint not required), the court believed it prudent to raise the issue prior to issuing the pretrial order. The court continued the pretrial conference and set a deadline for the plaintiffs to file a motion to amend the complaint. Its order stated:

> [T]he plaintiff is asked whether it will be amending its complaint to include a cause of action under § 523(a)(4). Fed. R. Civ. P. 15(a)-(b), *incorporated by* Fed. R. Bankr. P. 7015. The parties are asked to consider this court's decision on the issue. Civil Minutes at 14-16, *Missioui v. Ardelean*, No. 19-2135 (Bankr. E.D. Cal. 2019), ECF No. 135. If the plaintiffs intend to make a motion to amend the complaint, they shall do so on or before July 1, 2022.

Civil Minutes ¶ 3, ECF No. 76.

This motion followed.

AMENDING THE COMPLAINT

Rule 15 provides:

> Amendments Before Trial.
>
> (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
>
> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(c), *incorporated by* Fed. R. Bankr. P. 7015.

Policy favors trial on the merits and allowing amendments. Fed. R. Bankr. P. 15(a)(2); *Club v. Schlotzsky's Inc.*, 238 F.3d 363, 367 (5th Cir. 2001).

In considering the motion the court is mindful that:

> Courts may decline to grant leave to amend only if there is strong evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.' *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). '[T]he consideration of prejudice to the opposing party carries the greatest weight.' *Eminence Capital, LLC v. Aspeon*, Inc., 316 F.3d 1048, 1052 (9th Cir.2003).

Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty., 708 F.3d 1109, 1117 (9th Cir. 2013).

The burden of proof is on the party opposing the amendment. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 406-407 (11th Cir. 1989); see *Clarke v. Upton*, 703 F.Supp.2d 1037, 1041 (E.D. Cal. 2010); *Alzheimer's Institute of America v. Elan Corp. PLC*, 274 FRD 272, 276 (N.D. Cal. 2011).

DISCUSSION

Futility

Futility is a defense to a motion to amend. As one source summarized the futility defense.

> Futility of amendment: Ordinarily, courts do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend. (Challenges to the pleading are usually deferred until after leave to amend is granted and the amended pleading filed.) *[SAES Getters S.p.A. v. Aeronex, Inc.* (SD CA 2002) 219 F.Supp.2d 1081, 1086 (citing text); *Netbula, LLC v. Distinct Corp.* (ND CA 2003) 212 FRD 534, 549 (citing text)].
>
> Leave to amend may be denied if the proposed amendment is futile or would be subject to dismissal. [*Carrico v. City & County of San Francisco* (9th Cir. 2011) 656 F3d 1002, 1008; *FDIC v. Conner* (5th Cir. 1994) 20 F3d 1376, 1385—amendment futile if statute of limitations has run].
>
> Test: In assessing futility, the court applies the same standard governing Rule 12(b)(6) motions to dismiss: i.e., a proposed amendment is futile if it "does not

> plead enough to make out a plausible claim for relief." [*HSBC Realty Credit Corp. (USA) v. O'Neill* (1st Cir. 2014) 745 F3d 564, 578; *Adams v. City of Indianapolis* (7th Cir. 2014) 742 F3d 720, 734; *Marucci Sports, L.L.C. v. National Collegiate Athletic Ass'n* (5th Cir. 2014) 751 F3d 368, 378]
>
> Under this analysis the court determines if the complaint's "deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and that do not contradict the allegations in the original complaint." [*United States v. Corinthian Colleges* (9th Cir. 2011) 655 F3d 984, 995; *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.* (9th Cir. 2014) 744 F3d 595, 600; see *Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Ed.* (9th Cir. 2010) 616 F3d 963, 972— proposed amendment is futile if clear that complaint could not be saved by any amendment].

Phillips and Stevenson, *Federal Civil Procedure Before Trial: Calif. and Ninth Cir. Edits.*, § 8:1514-8:1514.1 (Rutter Group April 2022).

Wages as Employee Property

The defendants Patacsil argue that as a matter of law unpaid wages due plaintiff employees are not property that may form the basis of an embezzlement action. *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991). This court disagrees. As this court previously stated:

> An employer's failure to pay earned wages may form the basis of a § 523(a)(4) embezzlement action. *Mouraveiko v. Moglia*, 2014 WL 1407311 *3-4 (Bankr. D. OR April 10, 2014); *In re Ramirez*, 556 B.R. 446, 454 (Bankr. N.D. Cal. 2016). Central to the issue is whether state law recognizes earned but unpaid wages as the employee's property. California does so. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163 (2000) (once earned, wages are property of the employee); *Sims v. AT & T Mobility Services, LLC*, 955 F.Supp.2d 1110, 1118-1120 (E.D. Cal. 2013) ("there is clear authority under California law that employees have a vested property interest in the wages they earn, failure to pay them is a legal wrong that interferes with the employee's title in the wages, and an action for conversion can therefore be brought to recover unpaid wages"); *Alvarenga v. Carlson Wagonlit Travel, Inc.*, 2016 WL 466132 *3-5 (E.D. Cal. February 8, 2016).

Massioui v. Ardelean, No. 19-2135 (Bankr. E.D. Cal. October 5, 2021), ECF No. 135.

The takeaway is wages earned, but unpaid, are property of the employee, even though the remain in the hands of the employer. And if the other elements of embezzlement, 11 U.S.C. § 523(a)(4), are satisfied the debt may be excepted from discharge.

Res Judicata

The defendants Patacsil also argue the doctrine of claims preclusion, also known as res judicta, including merger and bar, makes the amendment futile. Because the defendants Patacsil assume that California law provides the rule of decision with respect to the application of res judicata and related doctrines, Oppos. 4:9-5:26, ECF No. 85, the court does so as well.

At the outset it is important to distinguish between res judicata (now claim preclusion), including the lesser doctrine of merger and bar, and collateral estoppel (now issue preclusion). The Supreme Court has summarized res judicata in this fashion:

> The general rule of res judicata applies to repetitious suits involving the same cause of action...The rule provides that *when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Comm'r v. Sunnen, 333 U.S. 591, 597 (1948) (emphasis added).

In contrast, collateral estoppel this way:

> But where the second action between the same parties is upon a different cause or demand, the principle of res judicata [now denominated collateral estoppel] is applied much more narrowly. *In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'* (citations omitted). *Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were*

> *not at issue in the first proceeding, even though such points might have been tendered and decided at that time.* But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, ss 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv.L.Rev. 1.

Id. (emphasis added).

Defendant Patacsils' argument has problems. To the extent that Patacsils rely on res judicata (claim preclusion), as a matter of law, that doctrine is inapplicable discharge exception actions, 11 U.S.C. § 523; that is true without regard to whether the underlying action was resolved by settlement or judgment. March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:1721 (Rutter Group December 2021); *Brown v. Felsen*, 442 U.S. 127 (1979) (settlement); *Archer v. Warner*, 538 U.S. 314 (2003) (settlement); *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984).[1] As the Ninth Circuit explained the issue:

> The main concern of both the Supreme Court in *Brown [v. Felsen]*...was to preserve the exclusive jurisdiction of the bankruptcy court to determine dischargeability. *Res judicata should not be applied to bar a claim by a party in bankruptcy proceedings, nor should a bankruptcy judge rely solely on state court judgments when determining the nature of a debt for purposes of dischargeability, if doing so would prohibit the bankruptcy court from exercising its exclusive jurisdiction to determine dischargeability*. In the present case, applying res judicata to bar the bankruptcy court from looking behind the default judgment to determine the actual amount of the obligation would not preclude the exercise of the bankruptcy court's exclusive jurisdiction to determine the nature of the subject debt for purposes of dischargeability.

In re Comer, 723 F.2d at 740. (emphasis added).

As a result, the doctrine of merger and bar is not applicable here.

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[1] *Bankruptcy Recovery Network v. Garcia (In re Garcia)*, 313 B.R. 307, 312 (9th Cir. BAP 2004) is inapposite and standard for the unremarkable proposition that a debt declared nondischargeable in one bankruptcy proceeding remains nondischargeable in subsequent bankruptcy filings. *Paine v. Griffin (In re Paine)*, 283 B.R. 33, 37 (9th Cir. BAP 2002).

To the extent that the defendants Patacsil argue that collateral estoppel have adversely decided elements of an embezzlement such that the amendment will be futile, they are also mistaken. Collateral estoppel is an affirmative defense that must be plead. Fed. R. Bankr. P. 8(c)(1) ("res judicata" encompassing claim preclusion and merger and bar). Failure to plead a nonjurisdictional affirmative defense waives it. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Arizona v. California*, 530 U.S. 392, 410 (2000); *In re Adbox, Inc.*, 488 F.3d 836, 841-842 (9th Cir. 2007). So, unless and until it is plead, it is not even in play.

But more importantly, it does not automatically bar this action. As the party asserting its applicability, the defendants Patacsil bear the burden of showing its applicability. *Vella v. Hudgins*, 20 Cal. 3d 251, 257 (1977).

> California has five prerequisites to the availability of issue preclusion: First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

In re Javahery, No. 2:14-BK-33249-DS, 2017 WL 971780, at *5 (B.A.P. 9th Cir. Mar. 14, 2017), aff'd, 742 F. App'x 307 (9th Cir. 2018), citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001).

Here, at least the first element, i.e., issue identity, second element i.e., actual litigation, and third element, i.e., necessarily decided are in play. The record of the proceedings in District Court has not been decided, nor had any party requested judicial notice.

Statute of Limitations

Finally, the defendants Patacsil contend that there is no "debt" to declare non-dischargeable because embezzlement is subject to a three year statute of limitation and that the events giving rise to this action occurred prior to 2012.

Success in a § 523 action requires to showings: (1) a "debt," *Grogan v. Garner*, 498 U.S. 279, 283-84 (1991); *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 n. 3 (9th Cir. 2015)"; and (2) the applicability of at least one of the subdivisions of § 523(a). Defendants Patacsil argue that res judicata and/or collateral

estoppel apply. Oppos. pp. 4-5, ECF No. 85. To the extent that collateral estoppel is applicable, a debt between the parties exists. *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984) (party precluded from challenging the amount of the debt, but not the nature of the debt under § 523). That debt has been reduced to judgment. Am. Compl. ¶ 9, ECF No. 81. As a result, any argument that the amendment is futile based on the statute of limitations is not well taken.

Prejudice

Prejudice is grounds to deny leave to amend. Phillips and Stevenson, *Federal Civil Procedure Before Trial: Calif. and Ninth Cir. Edits.*, § 8:1516 (Rutter Group April 2022).

Merger and Bar

Patacsils argue that claim preclusion (including merger and bar) will preclude them from defenses, including the statute of limitations, that could have been raised in District Court. This court disagrees. Most importantly, claim preclusion (res judicata) does not apply to discharge exception litigation. 11 U.S.C. § 523(a); *Brown v. Felsen*, 442 U.S. 127 (1979) (settlement); *Archer v. Warner*, 538 U.S. 314 (2003) (settlement); *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984).

Jury Trial

Patacsils also argue that allowing the amendment will deprive them of the right to trial by jury on the issue. They are mistaken. This court believes that the defendants have no such right to jury trial.

> Not jury triable: Like proceedings on an objection to discharge, *a proceeding to determine nondischargeability of a debt is equitable in nature and thus not jury triable*. [*In re Hashemi* (9th Cir. 1996) 104 F3d 1122, 1124; *In re Locke* (9th Cir. BAP 1996) 205 BR 592, 599-600].
>
> *It makes no difference that the creditor has a right to jury trial on its underlying claim against the debtor. The creditor waives that right by commencing a nondischargeability action in bankruptcy court, thereby submitting to bankruptcy court jurisdiction*. [*In re Choi* (BC ND CA 1991) 135 BR 649, 651; see also *Matter of Hallahan* (7th Cir. 1991) 936 F2d 1496, 1505 (applying same logic to debtor's right to jury trial (i.e., by filing bankruptcy, debtor voluntarily submits to bankruptcy court's jurisdiction))].

> Compare—action filed in state court: Where the bankruptcy court and state court have concurrent jurisdiction to determine nondischargeability, a creditor can preserve its right to jury trial by filing a state court action on the underlying claim and timely demanding a jury trial. If the debtor raises the bankruptcy discharge as a defense, the state court can determine nondischargeability.

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:1600-1601 (Rutter Group December 2021) (emphasis).

In the event that the defendants can convince this court that they are entitled to trial by jury, this court is empowered to conduct jury trials, with the consent of the parties, 28 U.S.C. § 157(e); General Order 182 or the defendants can remove the matter to District Court for trial. 28 U.S.C. § 157(d).

Timeliness of the Motion to Amend

Defendants Patacsil argue two species of timeliness problem: (1) the adversary proceeding bar date, i.e., 60 day after the date first set for the meeting of creditors, without the protection of the relation back doctrine; and (2) undue delay in seeking leave to amend, noting the passage of more than a year and one-half since the filing of the original adversary proceeding.

Rule 4007 Bar and Relation Back

Patacils argued that such an action is time barred. Rule 4007(c) requires that an action to except a debt from discharge under § 523(a)(2),(a)(4), (a)(6) be commenced not later than 60 days after the meeting of creditors. Here, that deadline was November 2, 2020. Plaintiff filed a timely adversary proceeding, asserting causes of action under § 523(a)(6) and § 523(a)(7).[2]

Whether an amended adversary proceeding under § 523 filed after the 60 day bar date, Fed. R. Bankr. 4007, is determined by the relation back rule. Fed. R. Civ. P. 15(c), *incorporated by* Fed. R. Bankr. P. 7015; *In re Markus*, 313 F.3d 1146 (9th Cir. 2002); *In re Magno*, 216 B.R. 34, 38-42 (9th Cir. BAP 1997).

The standards for relation back are well known. Rule 15 provides: "An amendment to a pleading relates back to the date of the original pleading when...(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or

[2] An action to determine the dischargeability of a debt under § 523(a)(7) may be brought at any time. Fed. R. Bankr. P. 4007(a).

attempted to be set out--in the original pleading." Fed. R. Bankr. P. 15(c)(1)(B), *incorporated by* Fed. R. Bankr. P. 7015.

The parties disagree as to its application here. Defendants Patacsil contend the § 523(a)(4) cause of action is time barred, arguing that the standard for relation back is adequacy of notice in the original, timely complaint. Oppos. 9:1-15, ECF No. 85. Plaintiffs contend that the defendants concede that the embezzlement cause of action, 11 U.S.C. § 523(a)(4), arose from the same operative as the fraud. Reply 3:22-26, ECF No. 88.

Both parties are mistaken. First, the standard for application of the relation back doctrine is that the amendment "arose out of the conduct, transaction, or occurrence." Fed. R. Civ. P. 15(c). Notice is an important consideration in determining whether the amendment arose out of the same conduct, transaction, or occurrence but it is not the standard. *Compare*, *In re Markus*, 313 F.3d 1146 (9th Cir. 2002) (focusing on the same conduct, transaction, or occurrence), with *In re Markus*, 268 B.R. 556, 562 (B.A.P. 9th Cir. 2001), aff'd in part, rev'd in part, 313 F.3d 1146 (9th Cir. 2002) (focusing on notice, "[t]he controlling question is whether this information in the January 20 motion put Markus on notice of what it was that Gschwend was seeking to achieve"). Second, the parties no not agree that the relation back doctrine saves the plaintiffs from an otherwise untimely amendment. Oppos. 9:1-15, ECF No. 85. Defendants' imprecise use of language was no such concession. *Id.* at 5:20.

For the sake of clarity, the court summarizes applicable black letter law on the relation back doctrine.

> Same "conduct, transaction or occurrence" required: The amended complaint must be based on the same operative facts as those set forth or attempted to be set forth in the original complaint. [*Mayle v. Felix* (2005) 545 US 644, 656, 125 S.Ct. 2562, 2570; *Martell v. Trilogy Ltd.*, supra, 872 F2d at 325—"a common core of operative facts"; see *ASARCO, LLC v. Union Pac. R.R. Co.* (9th Cir. 2014) 765 F3d 999, 1004—likely proved by "same kind of evidence" that supported original pleading (internal quotes and citation omitted)]
>
> ...
>
> Notice as critical factor: The relation back doctrine is liberally applied. *An amended complaint is not time-barred because it asserts a new theory. The basic inquiry is whether the opposing party was on notice of the nature of the claim raised by the amended pleading.* [*Santamarina v. Sears, Roebuck & Co.* (7th Cir. 2006) 466 F3d 570, 573; *Hall v. Spencer County, Ky.* (6th Cir. 2009) 583 F3d 930,

> 934; *ASARCO, LLC v. Union Pac. R.R. Co.*, supra, 765 F3d at 1004]
>
> Named defendants on notice of whole transaction: *Filing of a lawsuit "warns the defendant to collect and preserve his evidence in reference to … the whole transaction described in it …"* Thus, defendant is aware that claims regarding that transaction may be amended and that the form of relief and law relied upon are not confined to their original statement. [*Martell v. Trilogy Ltd.*, supra, 872 F2d at 326 (emphasis added); *In re Coastal Plains, Inc.* (5th Cir. 1999) 179 F3d 197, 216].

Phillips and Stevenson, *Federal Civil Procedure Before Trial: Calif. and Ninth Cir. Edits.*, § 8:1609-8:1621 (Rutter Group April 2022).

In contrast are situations without notice.

> No "relation back" if original pleading provides no notice: To invoke the "relation back" doctrine, the original pleading must give some indication of the facts on which the pleader's claim for relief is based. If it fails to do so, there is no room for an amended complaint to "relate back." [*Hernandez v. Valley View Hosp. Ass'n* (10th Cir. 2012) 684 F3d 950, 962—actual notice provided outside four corners of prior complaint irrelevant; *Baldwin County Welcome Ctr. v. Brown* (1984) 466 US 147, 149-150, 104 S.Ct. 1723, 1725].

Phillips and Stevenson, *Federal Civil Procedure Before Trial: Calif. and Ninth Cir. Edits.*, § 8:1626 (Rutter Group April 2022).

Markus is particularly helpful. There the Ninth Circuit considered relation back in the context of Rule 4007. Debtor Markus was a contract who performed work for creditor Gschwend. It did not go well and Gschewen filed suit against Markus in state court and obtained a judgment against him. Markus filed a Chapter 7 bankruptcy. The deadline for filing an action under §§ 523 and/or 727 was January 24, 2000. On January 20, 2022, Creditor Gschwend did not file an adversary proceeding, but on did file a "Motion to Object to Debtors Discharge and Convert the Chapter 7 Case to Chapter 13." She argued that the debtor (1) had engaged in "fraudulent actions"; (2) had both income and assets by which he could pay creditors; and (3) had fraudulent transferred assets. The bankruptcy court denied the motion. Almost two months later, filed an adversary proceeding alleging that Markus' debt to her was nondischargeable under § 523(a)(2),(a)(4), and (a)(6). Markus moved to dismiss the adversary proceeding noting its untimeliness. Fed. R. Bankr. 4004(a). The bankruptcy court agreed and found that the amendment "did not relate back to the January 20 motion because the complaint was directed to non-dischargeability of pre-judgment debt

whereas the motion, except for a conclusory reference to fraud leading to a debt, referred only to alleged violations of § 727.". *Id.* at 1149. The bankruptcy appellate panel reversed holding that the motion was a "deficiently pled complaint, and that the later adversary related back to it such that it was timely." In doing so, the bankruptcy appellate panel discussed the same operative facts standard but focused on the sufficiency of notice to the debtor of the creditor's claims in the adversary proceeding. The circuit recited the familiar standard under Rule 15(c):

> We permit relation-back if the new claim arises from the same 'conduct, transaction, or occurrence' as the original claim." *Dominguez*, 51 F.3d at 1510 (quoting *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 978 (9th Cir.1988)). As we explained in *Dominguez*, "[w]e will find such a link when 'the claim to be added will likely be proved by the "*same kind of evidence*" offered in support of the original pleadings.' *Id.* (quoting *Rural Fire Prot. Co. v. Hepp,* 366 F.2d 355, 362 (9th Cir.1966)); *see also Santana v. Holiday Inns*, Inc., 686 F.2d 736, 738 (9th Cir.1982) (noting that *once the defendant is in court on a claim arising out of a particular set of facts, he is not prejudiced if another claim, arising out of the same facts, is added*). Therefore, relation back turns on whether the fraud alleged in the March 29 complaint is the same as the fraud alleged in the motion.

Id. at 1150 (emphasis added).

The circuit reversed the bankruptcy appellate panel finding that the motion was not a complaint and that the two frauds (one alleged in the motion and the other alleged in the adversary proceeding) were different. The former was fraudulent transfers during the underlying state court action; the latter was fraud in conjunction with the work performed for Gschwend.

Embezzlement involves three elements: "Embezzlement under § 523(a)(4) requires a showing of: [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 Littleton, supra, 942 F2d at 555; In re Wada (9th Cir. BAP 1997) 210 BR 572, 576]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:640 (Rutter Group December 2021)

Here, the original complaint contains few, if any, facts. Broadly read it only states, (1) defendants operated three residential care facilities, Compl. ¶ 33, ECF No. 1; (2) plaintiffs were defendants' employees, *Id.* at PP 5, 7; (3) defendants' intentionally violated California's wage and hours laws, failing to pay plaintiffs all

wages due, *Id.* at ¶ 7, 21; and (4) nine plaintiffs brought suit against defendants in District Court and received an aggregate judgment of $873,815 plus attorneys' fees and costs. *Id.* at ¶ 8.

The facts behind the original complaint and those necessary to prove embezzlement, 11 U.S.C. § 524(a)(4), are not the same. *ASCARCO* reminds us that the legal theories arising from the "same operative facts" are those that will probably be proved by the "same kind of evidence." *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014); see also, *Mayle v. Felix*, 545 U.S. 644, 650 (2005) (amended complaints that require facts that are different as to time and type probably do not meet the same operative facts test); *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008) (different statistical evidence and witnesses do not arise from the same operative facts). Here, the facts supporting the original complaint focus on the defendants' compliance, or lack of compliance with the State of California's wage and hours law, as well as their intent to injure the plaintiffs. Comp. ¶¶ 7-8, 21, ECF No. 1. Embezzlement will also require proof that the defendants did not comply with State of California's wage and hours laws. But it adds facts that must be proven: (1) that unpaid wages in hands of the defendants were appropriated "to a sues other than" payment of wages; and (2) "circumstances indicating fraud." *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991). Viewed as concentric circles, the inquiry under the original complaint represents only a small circle; the inquiry under embezzlement is much larger, involving the original issue plus inquiry the defendant's use of the funds and circumstances indicting fraud. Because the facts in the original complaint a thin and because the amended complaint will require not only proof of violation of the wages and hours laws, but also inquiry into the disposition of the funds and whether fraud occurred, the court finds that the two claims do not share a common nucleus of operative facts. This alone defeats the plaintiffs' motion to amend.

Undue Delay

Finally, defendants Patacsil argue that the plaintiffs have unduly delayed bringing this motion and, as a result, they should be denied the opportunity to amend the complaint.

Delay alone is an insufficient basis to deny leave to amend.

> Most courts hold delay alone is not enough to support denial of a motion for leave to amend. Rather, there must be a showing of "prejudice to the opposing party, bad faith by the moving party, or futility of amendment." [*Bowles v. Reade* (9th Cir. 1999) 198 F3d 752, 758 (emphasis added); *see also Mayeaux v. Louisiana Health Service & Indem. Co.* (5th Cir. 2004) 376 F3d 420, 427; *Johnson v. Cypress Hill* (7th Cir. 2011) 641 F3d

867, 872—"the longer the delay, the greater the presumption against granting leave to amend" (internal quotes omitted)].

Phillips and Stevenson, *Federal Civil Procedure Before Trial: Calif. and Ninth Cir. Edits.*, § 8:1501 (Rutter Group April 2022).

Because the defendants have not identified prejudice, the delay in bringing the motion is not a basis to deny the motion.

Conclusion

Plaintiffs' assertion of a cause of action under 11 U.S.C. § 523(a)(4) is untimely. Fed. R. Bankr. P. 4007. The deadline to have filed such an action was November 2, 2020. The doctrine of relation back does not save the plaintiffs because the embezzlement action is not based on the same set of operative facts as the allegations in the plaintiffs' original, and timely, complaint. The motion will be denied.

LOCAL RULES VIOLATIONS

Plaintiff's motion to amend is replete with local rules violations.

Docket Control Number

Every motion must be designated by motion control number.

> (c) Docket Control Number.
>
> 1) In motions filed in the bankruptcy case, a Docket Control Number (designated as DCN) shall be included by all parties immediately below the case number on all pleadings and other documents, including proofs of service, filed in support of or opposition to motions.
>
> 2) In motions filed in adversary proceedings, the Docket Control Number shall be placed immediately below the adversary number.
>
> 3) The Docket Control Number shall consist of not more than three letters, which may be the initials of the attorney for the moving party (e.g., first, middle, and last name) or the first three initials of the law firm for the moving party, and the number that is one number higher than the number of motions previously filed by said attorney or law firm in connection with that specific bankruptcy case.

Example: The first Docket Control Number assigned to attorney John D. Doe would be DCN JDD-1, the second DCN JDD-2, the third DCN JDD-3, and so on. This sequence would be repeated for each specific bankruptcy case and adversary proceeding in which said attorney or law firm filed motions.

4) Once a Docket Control Number is assigned, all related papers filed by any party, including motions for orders shortening the amount of notice and stipulations resolving that motion, shall include the same number. However, motions for reconsideration and countermotions shall be treated as separate motions with a new Docket Control Number assigned in the manner provided for above.

LBR 9014-1(c).

Here, neither the motion, nor supporting papers, are so designated. See Mot. to Amend., ECF No. 79.

Aggregating Documents

Motions and notices of motion must be filed as separate documents. LBR 9014-1(d)(4). Here, the motion and the notice are improperly aggregated. Mot. to Amend., ECF No. 79.

Notice Deficiencies

The notice of motion does not contain the mandatory admonishments.

B) Notice.

(i) *The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition.*

(ii) *If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition.*

(iii) *The notice of hearing shall advise respondents that they can determine whether the matter has been resolved without oral argument or whether the court has issued a tentative ruling, and can view [any] pre-hearing dispositions by checking the Court's website at www.caeb.uscourts.gov after 4:00 P.M. the*

day before the hearing, and that parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

LBR 9014-1(d)(3)(B)(i)-(iii) (emphasis added).

Here, the notice contains none of the mandatory warnings. Notice, ECF NO. 79.

Certificate of Service

Each motion must be supported by a certificate of service. LBR 9014-1(e)(2) ("A proof of service, in the form of a certificate of service, shall be filed with the Clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed.")

Service of the motion upon defense counsel, Charles Hastings, did occur under Rule 9036.

(a) In general

This rule applies whenever these rules require or permit sending a notice or serving a paper by mail or other means.

(b) Notices from and service by the court

(1) Registered users
The clerk may send notice to or serve a registered user by filing the notice or paper with the court's electronic-filing system.

(2) All recipients
For any recipient, the clerk may send notice or serve a paper by electronic means that the recipient consented to in writing, including by designating an electronic address for receipt of notices. But these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk shall send the notice to or serve the paper at that address; and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the paper electronically at an address designated by the Director, unless the

entity has designated an address under § 342(e) or (f) of the Code.

(c) Notices from and service by an entity
An entity may send notice or serve a paper in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).

Fed. R. Bankr. P. 9036.

Charles Hastings is a user of the court's electronic filing system and, hence, serve was accomplished. But the movant did not document service as required by LBR 9014-1(e)(2).[3]

Exhibits

Exhibits filed in support of the motion are also not complaint with national and local rules. Exhibits, ECF No. 1. All documents, including exhibits must include a caption. Fed. R. Bankr. P. 7010, 9014(c); LBR 9004-2(b)(5). Exhibits must be filed as a single document, unless so large as to be incompatible with the electronic-filing system. LBR 9004-2(d)(1). Exhibits shall be sequentially numbered from the first page of the first page to the last page of the last exhibit. LBR 9004-2(d)(3). Exhibits must contain an index. LBR 9004-2(d)(2).

Counsel for the plaintiffs is warned that all future filings must comply with applicable provisions of the Federal Rules of Bankruptcy Procedure and with local rules. Failure to do so may result in summary denial of the motion and/or an order to show cause for sanctions against counsel.

CIVIL MINUTE ORDER

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

Plaintiff Joseph Cabardo et al.'s motion has been presented to the court. Having considered the motion, opposition, and reply, as well as the argument of counsel,

[3] On July 5, 2022, after the present motion was filed, the court amended local rules with respect to service by a party under Rule 90936 and filing a Certificate of Service. LBR 9036-1(a) provides: "Persons sending a notice or serving a paper under Fed. R. Bankr. P. 9036 shall file a certificate of service consistent with LBR 7005-1." In the pertinent part, LBR 7005-1 provides, "The service of pleadings and other documents in adversary proceedings, contested matters in the bankruptcy case, and all other proceedings in the Eastern District of California Bankruptcy Court by either attorneys, trustees, or other Registered Electronic Filing System Users shall be documented using the Official Certificate of Service Form (Form EDC 007-005) adopted by this Court." As of November 1, 2022, the use of Form EDC-007-005 is mandatory for attorneys. General Order 22-02.

IT IS ORDERED that the motion for leave to amend the complaint is denied.

2. 20-23457-A-7 **IN RE: ERNESTO/MARILYN PATACSIL**
20-2167 CAE-1

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT FOR DETERMINATION THAT DEBT IS NONDISCHARGEABLE
11-2-2020 [1]

CABARDO ET AL V. PATACSIL ET AL
HECTOR MARTINEZ/ATTY. FOR PL.

No Ruling

3. 22-20063-A-13 **IN RE: NATHANIEL SOBAYO**
22-2032 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-3-2022 [1]

SOBAYO V. WELLS FARGO BANK, N.A. ET AL
NATHANIEL SOBAYO/ATTY. FOR PL.

Final Ruling

The status conference is continued to August 30, 2022, at 1:30 p.m. A civil minute order will issue.

4. 22-20170-A-7 **IN RE: ROBERT RICO**
22-2023 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-18-2022 [1]

USE CREDIT UNION V. RICO
REILLY WILKINSON/ATTY. FOR PL.

No Ruling

5. 22-20581-A-7 **IN RE: MURRAY PETERSEN**
22-2033 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-6-2022 [1]

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA V. PETERSEN
KEVIN MORSE/ATTY. FOR PL.

Final Ruling

The status conference is continued to August 30, 2022, at 1:30 p.m. to coincide with the motion to dismiss. A civil minute order will issue.