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 17, 2021**
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. 20-25031-A-7 **IN RE: MATHEW/SHANNON GOODWIN**
21-2011

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-4-2021 [1]

LAWS ET AL V. GOODWIN ET AL
JEFFERY SWANSON/ATTY. FOR PL.

No Ruling

2. 07-22338-A-13 **IN RE: KEVIN/AMANDA MUNOZ**
20-2186

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
5-10-2021 [21]

MUNOZ ET AL V. WILSHIRE CREDIT
CORPORATION ET AL
PETER MACALUSO/ATTY. FOR PL.

No Ruling

3. 20-24339-A-7 **IN RE: JOSHUA HENRY**
20-2185 MHK-1

MOTION TO COMPEL
8-3-2021 [27]

TORRUELLA V. HENRY
PETER PULLEN/ATTY. FOR MV.

No Ruling

4. 20-24339-A-7 **IN RE: JOSHUA HENRY**
20-2185 MHK-2

MOTION MODIFY SCHEDULING ORDER
8-3-2021 [34]

TORRUELLA V. HENRY
PETER PULLEN/ATTY. FOR MV.

No Ruling

5. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2093

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
1-19-2021 [104]

HUSTED V. TAGGART ET AL
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

This Adversary having been dismissed, Order signed August 6, 2021, ECF No. 134, the Status Conference is concluded.

6. 20-23487-A-7 **IN RE: MARCIE OKPAKPOR**
20-2164

STATUS CONFERENCE RE: COMPLAINT
10-14-2020 [1]

OKPAKPOR V. OKPAKPOR
FRED IHEJIRIKA/ATTY. FOR PL.

No Ruling

7. 21-20688-A-7 **IN RE: BRADLEY BRIDGES**
21-2042

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-7-2021 [1]

LOVE ET AL V. BRIDGES, JR.
QUINN CHEVALIER/ATTY. FOR PL.

No Ruling

8. 21-20688-A-7 **IN RE: BRADLEY BRIDGES**
21-2042 RJM-1

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-20-2021 [11]

LOVE ET AL V. BRIDGES, JR.
UNKNOWN TIME OF FILING/ATTY. FOR MV.

Tentative Ruling

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

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

FACTS

The defendant in this adversary proceeding is the debtor Bradley Bridges in the underlying chapter 7 bankruptcy case (Case No. 21-20688). The plaintiffs Diane Love and Deborah Edwards are creditors in the debtor's bankruptcy case.

The plaintiffs filed a prepetition lawsuit against the defendant in California superior court, Complaint, State Court Compl., ECF No. 1. In the state court complaint, the plaintiffs alleged that the defendant fraudulently induced them to invest approximately $191,000 in a company called Worldwide Athletics.

The defendant was an initial owner of Worldwide Athletics. Both plaintiffs entered into a share purchase agreement with the defendant and the company's president Keith Moss. The defendant and Moss represented they would adhere to proper corporate governance, the plaintiffs would have control over all corporate funds and perform all the corporation's tax returns, Worldwide Athletics would "make millions" in annual revenue and profit, the plaintiffs would share in the profits, and they would be reimbursed for their stock purchase. *Id.* at 8:13-19, 13:8-7.

Plaintiff Love also entered into a promissory note where Love agreed to lend Worldwide $50,000.00, Worldwide promised to repay Love and to make monthly interest payments, her loan will be held in a separate account used exclusively for the purchase of Worldwide inventory and the loan would be repaid to Love via sales of inventory. *Id.* at 8:20-9:5; *see* Complaint, Exh. 2, ECF No. 1. The

company president Keith Moss signed the note. The defendant did not sign the note.

The plaintiffs stated they later discovered that the defendant and Moss stole or hid substantial amounts of the company's physical inventory and sold them to customers without recording the sales, thereby allowing the defendant and Moss to keep profits for themselves (in violation of the share purchase agreement). They further stated that the defendant and Moss used the company funds to start a new, unrelated business without documenting the transaction or seeking the approval of the shareholders (i.e., plaintiffs).

Plaintiff Love asserts two theories of fraud: (1) false representations made to the plaintiff when entering the share purchase agreement, State Court Compl. at 4:6-8:18; and (2) false representations made to the plaintiff when signing the promissory note, *Id*. at 8:20-12:21. Plaintiff Edwards also asserts fraud with regard to false representations made when she entered into the share purchase agreement, are as set forth in State Court Compl. 13:8-17.

The plaintiffs also allege the defendant was involved in a conspiracy while committing the alleged acts of fraud, and that he breached his fiduciary duties owed to Worldwide Athletics shareholders.

When the debtor filed for bankruptcy, the state court action was automatically stayed. The debtors scheduled the state court claims as a dischargeable debt in his schedules in his chapter 7 bankruptcy case, Case No. 21-20688, ECF No. 1 The plaintiffs subsequently brought this adversary proceeding, arguing that the state court claims are non-dischargeable under 11 U.S.C. § 523(a)(2) and (4). The defendant moved to dismiss this adversary proceeding, ECF No. 6, stating that the court lacks personal jurisdiction over the defendants and that the causes of action under § 523 should be dismissed.

FAILURE OF SERVICE

The defendant stated the plaintiffs failed to establish personal jurisdiction over him in this adversary proceeding, as the record does not establish that the complaint was served. Memorandum of Points and Authorities, 4:27-5:17, July 20, 2021, ECF No. 13. Service is ordinarily necessary for personal jurisdiction, and Fed. R. Bankr. P. 7004(e) requires service within 7 days after the summons issues. Fed. R. Bankr. P. 7012(a) further states that "If a complaint is duly served…the defendant shall serve an answer within 30 days after the issuance of the summons…"

However, the court construes the defendant's motion to be a motion to dismiss under Fed. R. Civ. P. 4(m), *incorporated by* Fed. R. Bankr. P. 7004. "If a defendant is not served within 90 days after the complaint if filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m), *incorporated by* Fed. R. Bankr. P. 7004(a). Here the complaint was filed on June 7, 2021,

ECF No. 1. Ninety days has not run. Therefore, the court cannot dismiss the complaint on the basis of failure of service at this time.

FRAUD, 11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) deems non-dischargeable debts incurred due to "false pretenses, a false representation, or actual fraud…"

Love

Share Purchase Agreement.

Since the plaintiffs' claim alleges fraud with respect to the purchase agreement, Fed. R. Civ. P. 9(b) applies. *See, e.g.*, *Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R. 257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). To meet the requirements of Rule 9, Plaintiffs must allege the who, what, when, where, why, and how of misconduct charged, what is false or misleading about the purportedly fraudulent statement, and why it is false. *Id.*

Here in their allegations of fraud regarding the share purchase agreement, the plaintiffs improperly lumped Defendant Bridges and Keith Moss together without differentiating their individual conduct. State Court Compl. at 4:6-8:18. Both the State Court Complaint and the Adversary Complaint fail to allege the who, how and where of the alleged fraud under *Vess*. For instance, the plaintiffs stated that they conducted an investigation and "discovered that tens of thousands of dollars worth of Worldwide inventory had been sold by Moss and Bridges and that Moss and Bridges had intentionally hidden the sales and revenue." State Court Compl. 6:6-9. These statements do not specify what the defendant Bridges did or the details of these hidden transactions. Also, they stated that "Moss and Bridges had represented to agents of the factory that was producing Worldwide inventory that Edwards was an ex-employee (which she was not) and a "very bad person"…and that Moss and Bridges had ordered the factory representatives *not* to provide Edwards with any information…" State Court Compl. 6:26-7:5. Again, these statements do not specify what the defendant Bridges did or how Moss or Bridges made such representations to the employees.

Without the additional details the claims to meet the requirements of Rule 9. The court will dismiss plaintiff Love's § 523(a)(2) cause of action as to the shareholder agreement.

Promissory Note

The plaintiffs pled facts to support their cause of action regarding the promissory note. State Court Compl. at 8:20-12:21. The plaintiffs filed a copy of the promissory note as an exhibit. Exh. 2, ECF No. 1. The court concludes the exhibit constitutes sufficient pleading under *Vess* as to the who, what, when, where, why, and how of misconduct charged. However, the promissory note was signed only by Keith Moss. *Id.* The defendant did not sign the promissory note. The plaintiff therefore failed to state a cause of action against the defendant.

The court will dismiss plaintiff Love's § 523(a)(2) cause of action as to the promissory note.

Edwards

Plaintiff Edwards also brings an identical fraud claim to plaintiff Love's with respect to the share purchase agreement. Again, Fed. R. Civ. P. 9(b) applies. The plaintiffs improperly lumped Defendant Bridges and Keith Moss together without differentiating their individual conduct. State Court Compl. at 12:26-15:20. Both the State Court Complaint and the Adversary Complaint fail to allege the who, how and where of the alleged fraud under *Vess*. Without the additional details the claims to meet the requirements of Rule 9. The court will dismiss plaintiff Edwards's § 523(a)(2) cause of action as to the shareholder agreement.

CONSPIRACY

The court takes issue with the plaintiffs' conclusory statements that the defendant was involved in a conspiracy. Compl. 2:18-21, 29-30; *see* State Court Compl. 3:14-26. No facts were pled to support the conspiracy allegations. Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121–22 (9th Cir. 2008); accord Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v.*

Iqbal, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). See generally, Wagstaff Practice Guide: Federal Civil Procedure Before Trial, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

The court finds the plaintiffs' claim regarding the alleged conspiracy under the *Iqbal/Twombly* analysis. Absent the conclusory statements of there being a conspiracy, there are no sufficient facts from which the court can find a plausible claim for conspiracy. The details in the filed copy of the promissory note, Exh. 2, ECF No. 1, do not obviate the court's conclusion that the plaintiffs insufficiently pled their conspiracy allegations.

FIDUCIARY DUTY, 11 U.S.C. § 523(a)(4)

11 U.S.C. § 523(a)(4) states that debts incurred for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" are non-dischargeable. "Although officers and directors of a California corporation are imbued with the fiduciary duties of an agent and certain duties of a trustee, they are not trustees with respect to corporate assets and thus do not have fiduciary capacity under § 523(a)(4)." *In re Cantrell*, 329 F.3d 1119, 1126 (9th Cir. 2003), *see* March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Nondischargeable Debts §22:621 (Rutter Group 2020).

The defendant is an officer of the corporation Worldwide Athletics. Complaint at 4:1. This is also not a case of corporate insolvency. Therefore, as a matter of law the defendant does not have any fiduciary capacity under § 523(a)(4). The court will dismiss the plaintiffs' § 523(a)(4) cause of action.

For the foregoing reasons, the court will grant the defendant's motion to dismiss.

LEAVE TO AMEND

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

The Ninth Circuit holds that the court should grant leave to amend even if plaintiff did *not* request leave to amend, unless it is clear that the complaint cannot be cured by the allegation of different facts. *Ebner v. Fresh, Inc.* 838 F.3d 958, 963 (9th Cir. 2016). Most courts hold that leave to amend need not be granted where plaintiff

fails to request it. *Wagner v. Daewoo Heavy Indus. America Corp.* 314 F.3d 541, 542-544 (11th Cir. 2002) (en banc); *Central Laborers' Pension Fund v. Integrated Electrical Services Inc.* 497 F.3d 546, 555-556 (5th Cir. 2007).

The Ninth Circuit has held that leave to amend should be granted where it appears possible that a defective Rule 9(b) complaint can be cured. *See Vess* at 1107 (noting that dismissals based on Rule 9(b) should ordinarily be without prejudice. "Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect.").

The plaintiffs did not file a response to the motion to dismiss. But since a defective Rule 9(b) complaint is involved, leave to amend will be granted and this motion to dismiss will be granted on a tentative.

CIVIL MINUTE ORDER

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

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The defendant's motion to dismiss has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted with 21 days leave to amend.