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 30, 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. 22-20808-A-7 **IN RE: BILLY TILLETT**
22-2040 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-29-2022 [1]

KEEFER V. TILLETT
JENNIFER PRUSKI/ATTY. FOR PL.

Final Ruling

The plaintiff has not validly effected service process. The problem is delay between issuance of the summons and its service. Rule 7004 provides:

> Summons: time limit for service within the United States. *Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by delivery of the summons and complaint within 7 days after the summons is issued.* If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service. This subdivision does not apply to service in a foreign country.

Fed. R. Bankr. P. 7004(e) (emphasis added).

Here, the summons was issued June 29, 2022. ECF No. 3. Service was not accomplished until July 20, 2022. Certificate of Service ¶ 2, ECF No. 6. Since service effected more than seven days after the issuance of the summons, service was ineffective.

No later than September 14, 2022, the plaintiff shall obtain and serve a reissued summons and complaint. The status conference is continued to November 1, 2022. A civil minute order will issue.

2. 22-20808-A-7 **IN RE: BILLY TILLETT**
22-2040 JLP-1

MOTION FOR NONDISCHARGEABILITY OF CIVIL JUDGMENT BETWEEN TED KEEFER AND BILLY DOCK TILLETT
7-22-2022 [7]

KEEFER V. TILLETT
JENNIFER PRUSKI/ATTY. FOR MV.

Final Ruling

The motion is denied without prejudice.

Several problems preclude granting relief. First, service of the summons and complaint has not been properly affected. Unless and

until that occurs, this court lacks personal jurisdiction over the defendant and such a motion is improper.

Second, though styled as a "Motion for Order of Nondischargeability of Civil Judgment," it is in reality, a motion for summary judgment, premised on the issue preclusive effect of a stipulated California state court judgment. As such it must comply with applicable local rules for summary judgment. LBR 7056-1 (no separate statement, insufficient notice, i.e., 39 days notice); see also 9004-2(d) (exhibits must be Bates stamped and indexed).

Third, the state court judgment becomes nondischargeable by virtue of issue preclusion (collateral estoppel), not claim preclusion (res judicata). Res judicata is inapplicable to § 523 actions.

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).

To the extent that the plaintiff relies 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). 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).

Moreover, as the party asserting its applicability, the plaintiff bears the burden of showing its applicability. *Vella v. Hudgins*, 20 Cal. 3d 251, 257 (1977). Organic California law governs.

> 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).

No such showing has been made here.

Fourth, collateral estoppel may be applied to stipulated judgments under some circumstances.

> Ultimately, the critical question under California law remains whether the parties manifested an intent to be bound by the judgment. *CSAAIB*, 50 Cal. 3d at 664, 268 Cal.Rptr. 284, 788 P.2d 1156; see also *FDIC v. Daily (In re Daily)*, 47 F.3d 365, 369 & n.8 (9th Cir. 1995) (holding that by stipulating to suspend nondischargeability action pending completion of a district court RICO action, parties manifested their intent to be bound by the result in the RICO action in the nondischargeability action).
>
> The determination of the parties' intent to be bound by the stipulated judgment must be treated like any other question regarding contractual intent: "The absence of manifest intention on the face of the instrument would not necessarily prevent defendants from proving on remand, however, as a matter of fact, that the parties intended the unlawful detainer judgment to settle their entire relationship. A prior stipulated or consent judgment is subject to construction as to the parties' intent, and if sufficiently ambiguous may be interpreted in light of extrinsic evidence." Landeros, 39 Cal. App. 4th at 1172, 46 Cal.Rptr.2d 165; see also In re Johnson, 2018 WL 1803002, at *5 ("[W]here the record or judgment evidences an intent by the parties for a stipulated judgment to be preclusive ... a court may give [preclusive] effect to that judgment." (Emphasis added)).

In re Italiane, 632 B.R. 662, 672–73 (B.A.P. 9th Cir. 2021), appeal dismissed, No. 21-60054, 2022 WL 327503 (9th Cir. Jan. 6, 2022)

The court will not prejudge the question of whether the present stipulated judgment may form the basis of collateral, but rather only alerts the parties to the presence of the issue.

For each of these reasons, the motion for summary judgment will be denied without prejudice. A civil minute order will issue.

3. 20-23726-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
21-2016 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-10-2021 [1]

AFRICAN METHODIST EPISCOPAL
ZION CHURCH ET AL V. AME ZION
HAGOP BEDOYAN/ATTY. FOR PL.

No Ruling

4. 20-23726-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
22-2030 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-23-2022 [1]

KYLES TEMPLE AFRICAN METHODIST
EPISCOPAL ZION CHUR V. AME
HAGOP BEDOYAN/ATTY. FOR PL.

No Ruling

5. 15-21528-A-13 **IN RE: KEVIN KRONE**
22-2038 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-22-2022 [1]

KRONE V. DEUTSCHE BANK
NATIONAL TRUST COMPANY ET AL
PETER MACALUSO/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

6. 22-20545-A-7 **IN RE: KEITH LARSEN**
22-2036 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-10-2022 [1]

OKASAKI ET AL V. LARSEN
JASON SHERMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

7. 20-23246-A-7 **IN RE: SACRAMENTO I STEAKHOUSE, L.P.**
22-2039 CAE-1

STATUS CONFERENCE RE: COMPLAINT
6-29-2022 [1]

SMITH V. OUTWEST RESTAURANT
GROUP, INC. ET AL
J. CUNNINGHAM/ATTY. FOR PL.

Final Ruling

The status conference is continued to October 18, 2022, at 1:30 p.m., Order signed August 22, 2022, ECF #19.

8. 20-20853-A-7 **IN RE: RODNEY/DELANI PLACE**
20-2109 CAE-1

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO REQUEST DETERMINATION OF DISCHARGEABILITY
6-1-2020 [1]

LABOR COMMISSIONER OF THE
STATE OF CALIFORNIA V. PLACE
MATTHEW SIROLLY/ATTY. FOR PL.

Final Ruling

The pretrial conference is concluded. A civil minute order shall issue.

9. 20-20853-A-7 **IN RE: RODNEY/DELANI PLACE**
20-2109 LCO-10

MOTION FOR ENTRY OF DEFAULT JUDGMENT
6-24-2022 [96]

LABOR COMMISSIONER OF THE
STATE OF CALIFORNIA V. PLACE
MATTHEW SIROLLY/ATTY. FOR MV.

Final Ruling

Motion: Entry of Default Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
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).

DISCUSSION

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a), *incorporated by* Fed. R. Bankr. P. 7055.

Ordinarily, such an action proceeds in two steps. First, the Clerk of the Court enters the default of the non-responding party. Fed. R. Civ. P. 55(a). Second, the plaintiff then proves up the default. Fed. R. Civ. P. 55(b).

Here, the court struck defendant Rodney Place's answer and ordered the Clerk to entry his default. Civ. Minutes ECF No. 94. This takes the place of the first step in the process.

The plaintiff now seeks to prove up the default by judgment. Here, the court believes that the operative section is 11 U.S.C. § 523(a)(6). The elements of that section are well known.

> A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> ...
>
> for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6).

Case law amplifies these requirements.

> These are separate elements: For purposes of § 523(a)(6) nondischargeability, the bankruptcy court must find the injury inflicted by the debtor was both "willful" and "malicious." [*Matter of Ormsby* (9th Cir. 2010) 591 F3d 1199, 1206; see also *In re Barboza* (9th Cir. 2008) 545 F3d 702, 711 (remanded because lower court did not address "malicious" element); *In re Su* (9th Cir. 2002) 290 F3d 1140, 1147 (remanded where lower court's analysis conflated "willful" and "malicious" elements)].
>
> "Willful injury": "Willful" within the meaning of § 523(a)(6) means "deliberate or intentional." [*Kawaauhau v. Geiger* (1998) 523 US 57, 61, 118 S.Ct. 974, 977, fn. 3].

> The "willful injury" requirement is met when the creditor shows that: [1] the debtor had a subjective motive to inflict the injury; or [2] the debtor believed the injury was substantially certain to occur as a result of his or her conduct. [*In re Hamilton* (9th Cir. BAP 2018) 584 BR 310, 319, citing *In re Jercich* (9th Cir. 2001) 238 F3d 1202, 1208; see also *In re Su*, supra, 290 F3d at 1144].
>
> Subjective standard: Section 523(a)(6) nondischargeability is limited "to those situations in which the debtor possesses subjective intent to cause harm or knowledge that harm is substantially certain to result from his actions." [*In re Su*, supra, 290 F3d at 1145, fn. 3 (emphasis added); *In re Black* (9th Cir. BAP 2013) 487 BR 202, 211].

Rutter Group § 22:670 et seq.

> "Malicious injury": A "malicious injury" under § 523(a)(6) involves: [1] a wrongful act; [2] done intentionally; [3] that necessarily causes injury; and [3] that is committed without just cause or excuse. [*In re Jercich*, supra, 238 F3d at 1209; *In re Thiara* (9th Cir. BAP 2002) 285 BR 420, 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798].

Rutter Group § 22:680.

The court finds that well-plead facts support the plaintiff's contention under 523(a)(6). Compl. ¶¶ 7-24, ECF No. 1. The amount owed is $460,882.87. Mem. P & A 15:1-8, ECF No. 98. The motion will be granted.

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 Labor Commissioner, State of California's motion 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; and

IT IS FUTHER ORDERED that as to Rodney Place the debt is non-dischargeable under 11 U.S.C. § 523(a)(6) in the amount of $460,882.97.

10. 20-20853-A-7 **IN RE: RODNEY/DELANI PLACE**
20-2109 LCO-11

MOTION FOR SUMMARY JUDGMENT
7-14-2022 [105]

LABOR COMMISSIONER OF THE
STATE OF CALIFORNIA V. PLACE
MATTHEW SIROLLY/ATTY. FOR MV.

Final Ruling

Motion: Summary Judgment (Delani D. Place)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
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).

LAW

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.*

"Where the non-moving party [e.g., a plaintiff] bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* (citation omitted). The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which [the factfinder] could reasonably render a verdict in the non-moving party's favor." *Id.*

When the moving party has the burden of persuasion at trial (e.g., a plaintiff on claim for relief or a defendant as to an affirmative defense), the moving party's burden at summary judgment is to "establish beyond controversy every essential element of its . . . claim. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). In such a case, there is no need to disprove the opponent's case "[i]f the evidence offered in support of the motion establishes every essential element of the moving party's claim or [affirmative] defense." Hon. Virginia A. Phillips & Hon. Karen L. Stevenson, *Federal Civil Procedure Before Trials, Calif. & 9th Cir. Edit.*, Summary Judgment, Burden of Proof ¶ 14:126.1 (Rutter Group 2019).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

DISCUSSION

Section 523(a)(6)

> A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> ...

> for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6).

Case law amplifies these requirements.

> These are separate elements: For purposes of § 523(a)(6) nondischargeability, the bankruptcy court must find the injury inflicted by the debtor was both "willful" and "malicious." [*Matter of Ormsby* (9th Cir. 2010) 591 F3d 1199, 1206; see also *In re Barboza* (9th Cir. 2008) 545 F3d 702, 711 (remanded because lower court did not address "malicious" element); *In re Su* (9th Cir. 2002) 290 F3d 1140, 1147 (remanded where lower court's analysis conflated "willful" and "malicious" elements)].
>
> "Willful injury": "Willful" within the meaning of § 523(a)(6) means "deliberate or intentional." [*Kawaauhau v. Geiger* (1998) 523 US 57, 61, 118 S.Ct. 974, 977, fn. 3].
>
> The "willful injury" requirement is met when the creditor shows that: [1] the debtor had a subjective motive to inflict the injury; or [2] the debtor believed the injury was substantially certain to occur as a result of his or her conduct. [*In re Hamilton* (9th Cir. BAP 2018) 584 BR 310, 319, citing *In re Jercich* (9th Cir. 2001) 238 F3d 1202, 1208; see also *In re Su*, supra, 290 F3d at 1144].
>
> Subjective standard: Section 523(a)(6) nondischargeability is limited "to those situations in which the debtor possesses subjective intent to cause harm or knowledge that harm is substantially certain to result from his actions." [*In re Su*, supra, 290 F3d at 1145, fn. 3 (emphasis added); *In re Black* (9th Cir. BAP 2013) 487 BR 202, 211].

Rutter Group § 22:670 et seq.

> "Malicious injury": A "malicious injury" under § 523(a)(6) involves: [1] a wrongful act; [2] done intentionally; [3] that necessarily causes injury; and [3] that is committed without just cause or excuse. [*In re Jercich*, supra, 238 F3d at 1209; *In re Thiara* (9th Cir. BAP 2002) 285 BR 420, 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798].

Rutter Group § 22:680.

Here, the Separate Statement of Undisputed Facts, ECF No. 108, and supporting evidence are without dispute and show that the defendant's actions were willful and malicious. The motion will be granted.

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 Labor Commissioner, State of California's motion 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 in the entire amount prayed; and

IT IS FURTHER ORDERED that not later than September 15, 2022, the plaintiff shall lodge a judgment consistent with the findings herein.

11. 20-20853-A-7 **IN RE: RODNEY/DELANI PLACE**
20-2109 LCO-12

MOTION FOR TERMINATING SANCTIONS AND/OR MOTION TO ISSUE, EVIDENTIARY AND OR MONETARY SANCTIONS
7-15-2022 [118]

LABOR COMMISSIONER OF THE
STATE OF CALIFORNIA V. PLACE
MATTHEW SIROLLY/ATTY. FOR MV.

Final Ruling

Motion: Terminating Sanctions
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
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).

DISCUSSION

Rule 37(b)(2)(A)(iii) authorizing terminating sanctions for failure to comply with court ordered discovery. Fed. R. Civ. P. 37(b)(2)(A)(iii). Here, defendant Delani D. Place has not so complied. See Civ. Minutes ¶ 2, ECF No. 94; Mem. P & A 3:2-12, ECF No. 120. The motion will be granted.

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 Labor Commissioner, State of California's motion 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; and

IT IS FURTHER ORDERED that defendant Delani D. Place's answer is stricken and the Clerk of the Court will enter her default.

12. 22-20063-A-13 **IN RE: NATHANIEL SOBAYO**
22-2032 BPC-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-21-2022 [13]

SOBAYO V. WELLS FARGO BANK,
N.A. ET AL
UNKNOWN TIME OF FILING/ATTY. FOR MV.

Final Ruling

The motion to dismiss is continued to September 27, 2022, at 1:30 p.m. The record is closed and, absent further order of this court, no other filings are authorized. A civil minute order will issue.

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

CONTINUED 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 September 27, 2022, at 1:30 p.m. A civil minute order will issue.

14. 22-20581-A-7 **IN RE: MURRAY PETERSEN**
22-2033 CAE-1

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

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

Tentative Ruling

The status conference is continued to November 1, 2022, at 1:30 p.m. to allow the plaintiff to file its First Amended Complaint. In the event the defendant challenges the First Amended Complaint by Rule 12 motion, scheduled to be heard November 22, 2022, the court will almost certainly continue the status conference to the date of the hearing on the Rule 12 motion. A civil minute order will issue.

15. 22-20581-A-7 **IN RE: MURRAY PETERSEN**
22-2033 HG-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-6-2022 [8]

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA V. PETERSEN
UNKNOWN TIME OF FILING/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding, Rule 12(b)(6)
Notice: Written opposition filed
Disposition: Granted in part with leave to amend, denied in part
Order: Civil minute order

Murray Todd Petersen ("Petersen") moves under Rule 12(b)(6) to dismiss the complaint filed by Travers Casualty & Surety Company of America ("Travelers Casualty") filed against him. That complaint purports to plead causes of action under 11 U.S.C. § 523(a)(2)(A),(a)(4),(a)(6). As Petersen sees it, the plaintiff has "failed to state facts...sufficient to constitute valid claims" under § 523(a)(2),(a)(4),(a)(6). Mot. 2:5-9, ECF No. 8. Travelers Casualty opposes the motion.

FACTS

SCF Securities, Inc. and SCF Holdings, Inc. (collectively "SCF") is a broker-dealer offering investment and insurance services. Compl. ¶¶ 1, 6, ECF No. 6. Petersen was one of its registered representatives. *Id.* at ¶ 2. Travelers Casualty insured SCF. Compl. ¶ 1.

The key facts are set forth early in the complaint.

> Petersen was one of SCF's registered representatives. His association with SCF began on November 2, 2015, and ended on October 29, 2019., when SCF terminated his association. In his role as a registered representative with SCF, Petersen provide investment advice to clients. In addition to his investment advisory role with SCF, Petersen was also involved in an outside business activity selling diamonds and jewelry. This outside business was disclosed to SCF as an authorized "Outside Business Activity ("OBA"). According to Petersen's statements to SCF his business of selling diamonds and jewelry did not involve investments or investing advice but was purely a sales position. SCF approved of the OBA.

> Despite his assertion to SCF that his OBA did not involve his investment business, Petersen, in fact, sold diamonds and jewelry to many of his clients as alternative investments. While the specifics of each claims' claim differ slightly, the overall allegations match. In each instance, the investor purchased diamonds and/or jewelry through Petersen. The diamonds and jewelry were pitched to the clients as alternative investments. However, in each case, Petersen was either never able to produce the diamonds or jewelry purchased or, when produced, the item's value was a mere fraction of its purchase price. In either circumstance, the investors alleged to have lost significant sums of money from Petersen's actions...

Id. at ¶¶ 8-9.

At least give investors arbitration under the Financial Industry Regulatory Authority. As SCF's insurer, Traveler's settled those arbitration claims and was subrogated to SCF's rights. *Id.* at ¶¶ 10. By virtue of its duty to defend and indemnify SCF, Traveler's has been injured of upwards of $800,000. *Id.* ¶¶ 10, 24, 25.

Petersen filed a Chapter 7 bankruptcy. This adversary proceeding followed.

LAW

Rule 8

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). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121–22 (9th Cir. 2008) ("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"); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering the sufficiency of the complaint, the court may consider the factual allegations in the complaint itself and some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

"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).

Plausibility means that the plaintiff's entitlement to relief is more than possible. *Twombly*, 550 U.S. at 570 (the facts plead "must cross the line from conceivable to plausible"); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11 Cir. 2017). Allegations that are "merely consistent" with liability are insufficient. *Iqbal*, 556 U.S. at 662; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, Wagstaff, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility, and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

Rule 9

Moreover, fraud is subject to particular pleadings requirements. Since this is a claim alleging fraud, Rule 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). A plaintiff must include the "who, what, when, where, and how" of the fraud. Id.

DISCUSSION

Section 523(a)(2)

The elements of fraud are well-known:

> To except a debt, or an extension or renewal of credit from discharge under § 523(a)(2)(A), the creditor must show: [1] the debtor made representations that at the time the debtor knew to be false; [2] the debtor made those representations with the intention and purpose of deceiving the creditor (scienter); [3] the creditor justifiably relied on those representations; and [4] the creditor sustained losses as a proximate result of the debtor's representations. [*In re Shannon* (9th Cir. BAP 2016) 553 BR 380, 388; *In re Sabban* (9th Cir. 2010) 600 F3d 1219, 1222; *In re Eashai* (9th Cir. 1996) 87 F3d 1082, 1086]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:452 (Rutter Group December 2021).

The plaintiff has two potential theories: (1) Petersen misrepresented to SCF the true nature, i.e., diamonds and jewelry as an alternative investment strategy, Compl. ¶ 7 (Petersen told SCF that "his business of selling diamonds and jewelry did not involve investments or investing advice but was purely a sale position"); and (2) Petersen made misrepresentations to his clients, i.e., that diamonds and/or jewelry would be purchased and were not or were of far less value than represented. *Id.* at ¶ 8, 19.

Wile argument might be made that the pleadings satisfy the *Iqbal* and *Twombly* standards, the facts do not satisfy the particularity requirements of Rule 9. The most that can be said of the facts plead are that: (1) the statements of either theory occurred before or on or about November 2015, to October 2019, *Id.* at ¶ 7; (2) that the statements were made to SCF and/or five of his clients, *Id.* at ¶ 9; and (3) that Petersen represented to SCF that his sales were not made as investments, Id. at ¶ 7, and to his clients that "they should purchase diamonds and jewelry as an alternative investment strategy authorized by SCF." *Id.* at ¶ 19. These factual statements do not satisfy Rule 9 and the motion will be sustained.

Section 523(a)(4)

The elements of § 523(a)(4) for fraud or defalcation in a fiduciary capacity are also well known.

> Fiduciary misconduct: When the nondischargeability complaint is based on fraud or defalcation in a fiduciary relationship, the creditor must prove: [1] the debtor was acting in a fiduciary capacity; and [2] while acting in that capacity, the debtor engaged in fraud or defalcation. [*In re Stanifer* (9th Cir. BAP 1999) 236 BR 709, 713].
>
> "Fiduciary capacity": To prevail on a § 523(a)(4) nondischargeability claim, the plaintiff must prove the debtor's fraud or defalcation and that the debtor was acting in a fiduciary capacity when the debtor committed the fraud or defalcation. [*In re Honkanen* (9th Cir. BAP 2011) 446 BR 373, 378].
>
> Determined under federal law: The existence of a fiduciary relationship under § 523(a)(4) is a matter of federal law. [*In re Berman* (7th Cir. 2011) 629 F3d 761, 767-768; In re Nail (8th Cir. BAP 2011) 446 BR 292, 299-300].
>
> Fiduciary capacity under state law insufficient: The definition of "fiduciary" for purposes of § 523(a)(4) is narrow; not all persons treated as fiduciaries under state law are considered to "act in a fiduciary capacity" for purposes of bankruptcy law. Thus, "[t]he broad, general definition of fiduciary—a relationship involving confidence, trust and good faith—is inapplicable." [*Double Bogey, L.P. v. Enea* (9th Cir. 2015) 794 F3d 1047, 1050 (brackets in original; internal quotes omitted); *In re Davis* (BC ND CA 2013) 486 BR 182, 192].
>
> Therefore, nondischargeability under § 523(a)(4) cannot be established simply by showing a debtor was a fiduciary

under state law. [*In re Berman*, supra, 629 F3d at 767; *In re Honkanen*, supra, 446 BR at 379]

Compare—state law relevant: On the other hand, state law is important in determining whether a trust obligation exists. [*Matter of Harwood* (5th Cir. 2011) 637 F3d 615, 620; and see ¶ 22:610].

Express or technical trust required: For purposes of § 523(a)(4), the fiduciary relationship must be one arising from an express or technical trust. [*Double Bogey, L.P. v. Enea*, supra, 794 F3d at 1050; *In re Cantrell* (9th Cir. 2003) 329 F3d 1119, 1125; *In re Lewis* (9th Cir. 1996) 97 F3d 1182, 1185].

Imposed by statute: For a trust relationship to be established under § 523(a)(4), the applicable statute must clearly define fiduciary duties and identify trust property. [*In re Honkanen*, supra, 446 BR at 379; In re Hemmeter (9th Cir. 2001) 242 F3d 1186, 1190; *In re Moeller* (BC SD CA 2012) 466 BR 525, 531-532].

Trust must exist prior to wrongdoing: The trust giving rise to a fiduciary relationship under § 523(a)(4) must be imposed prior to (and without reference to) any wrongdoing by the debtor. [*In re Honkanen*, supra, 446 BR at 379, fn. 8; In re Lewis, supra, 97 F3d at 1185; *Ragsdale v. Haller* (9th Cir. 1986) 780 F2d 794, 796].

Identifiable trust res required: General fiduciary obligations are not sufficient to satisfy § 523(a)(4)'s fiduciary capacity requirement in the absence of an identifiable trust res. [*In re Honkanen*, supra, 446 BR at 379-380].

Express trust under California law: Under California law, an express trust requires five elements: [1] present intent to create a trust; [2] trustee; [3] trust property; [4] a proper legal purpose; and [5] a beneficiary. [*In re Honkanen*, supra, 446 BR at 379, fn. 6].

Technical trust under California law: A technical trust under California law arises "from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like." [*In re Honkanen*, supra, 446 BR at 379, fn. 7 (internal quotes omitted)].

Rutter Group § 22:604 et seq.

Two theories of a fiduciary relationship exit here: (1) a fiduciary relationship between Petersen and SCF; and (2) a fiduciary relation between Petersen and his clients, for which vicarious liability attached to SCF. As plead, there is no indication of the existence of an express trust. A technical trust might exist by virtue of Petersen's position as an investment advisor. No Ninth Circuit case has decided the issue. But several lines of cases are instructive. For example, real estate brokers are not fiduciaries for their clients.

> An individual debtor's possession of a real estate license, without more, does not confer "fiduciary capacity" for purposes of § 523(a)(4). [*In re Honkanen* (9th Cir. BAP 2011) 446 BR 373, 378—debtor/real estate broker who did not handle any property in trust for creditor was not acting in fiduciary capacity under § 523(a)(4)].

Rutter Group § 22:616.

Similarly, business advisor/financial managers are generally not fiduciaries.

> Similarly, a business manager/financial advisor, who purportedly performed real estate services but who was not a licensed real estate agent, was not a fiduciary for purposes of § 523(a)(4). [*In re Davis* (BC ND CA 2013) 486 BR 182, 192-193].

Rutter Group § 22:616.2.

In contrast, an attorney may, under some circumstances, be a fiduciary.

> In the Ninth Circuit, a general fiduciary attorney-client relationship may rise to the level of a fiduciary relationship for purposes of § 523(a)(4) *if client trust funds (i.e., identifiable trust property) are involved*. [In re Banks (9th Cir. 2001) 263 F3d 862, 871].

Rutter Group § 22:615.

From these cases, the court infers whether a fiduciary duty exists depends not on the defendant's position, i.e., financial advisor, attorney, but whether the defendant handle identifiable trust property. As a consequence, the analysis is fact driven. From the facts plead, the court does not find it plausible of *Iqbal/Twombly* that a fiduciary duty to SCF and/or Petersens' clients exited. The motion will be granted with leave to amend.

Section 523(a)(6)

> A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> ...
>
> for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6).

Case law amplifies these requirements.

> These are separate elements: For purposes of § 523(a)(6) nondischargeability, the bankruptcy court must find the injury inflicted by the debtor was both "willful" and "malicious." [*Matter of Ormsby* (9th Cir. 2010) 591 F3d 1199, 1206; see also *In re Barboza* (9th Cir. 2008) 545 F3d 702, 711 (remanded because lower court did not address "malicious" element); *In re Su* (9th Cir. 2002) 290 F3d 1140, 1147 (remanded where lower court's analysis conflated "willful" and "malicious" elements)].
>
> "Willful injury": "Willful" within the meaning of § 523(a)(6) means "deliberate or intentional." [*Kawaauhau v. Geiger* (1998) 523 US 57, 61, 118 S.Ct. 974, 977, fn. 3].
>
> The "willful injury" requirement is met when the creditor shows that: [1] the debtor had a subjective motive to inflict the injury; or [2] the debtor believed the injury was substantially certain to occur as a result of his or her conduct. [*In re Hamilton* (9th Cir. BAP 2018) 584 BR 310, 319, citing *In re Jercich* (9th Cir. 2001) 238 F3d 1202, 1208; see also *In re Su*, supra, 290 F3d at 1144].
>
> Subjective standard: Section 523(a)(6) nondischargeability is limited "to those situations in which the debtor possesses subjective intent to cause harm or knowledge that harm is substantially certain to result from his actions." [*In re Su*, supra, 290 F3d at 1145, fn. 3 (emphasis added); *In re Black* (9th Cir. BAP 2013) 487 BR 202, 211].

Rutter Group § 22:670 et seq.

> "Malicious injury": A "malicious injury" under § 523(a)(6) involves: [1] a wrongful act; [2] done intentionally; [3] that necessarily causes injury; and [3] that is committed without just cause or excuse. [*In re Jercich*, supra, 238 F3d at 1209; *In re Thiara* (9th Cir. BAP 2002) 285 BR 420, 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798].

Rutter Group § 22:680.

Defendant moved to dismiss the § 523(a)(6) action but did not brief the issue. Compare, Mot. 2:5-9, ECF No. 8, with Mem. P & A, ECF No. 10 (omitting discussion of the issue).

This court believes that the complaint has minimally plead an action for willful and malicious injury. Compl. ¶¶ 6-8, 36-47. Considering well-pleaded facts, and only facts, *Id.* at ¶ 6-8, two inferences are possible: (1) Petersen knew that his actions were substantially certain to result in injury, *In re Jercich*, 238 F3d 1202, 1208 (9th Cir. 2001); and (2) Petersen actions caused injury but that he neither intended to cause injury or knew that injury was substantially certain to occur. With limited exception (not applicable here), the court should not weigh competing inferences in determining plausibility. As a result, the plaintiff has stated a plausible claim for § 523(a)(6) relief and the motion will be denied.

Leave to Amend

> Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." In determining whether to grant leave to amend the court should consider five factors: bad faith, undue delay, prejudice, futility, and previous amendments. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

In re Jorgensen, No. 18-14586-A-13, 2019 WL 6720418, at *9 (Bankr. E.D. Cal. Dec. 10, 2019).

Here, this is the plaintiff's first effort to plead. None of the five *Johnson* factors are yet present. The plaintiff will be given leave to file an amended complaint.

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.

Murray Todd Petersen's Rule 12(b)(6) motion to dismiss has been presented to the court. Having considered the complaint, the motion, the memorandum of points and authorities, and the opposition,

IT IS ORDERED that the motion to dismiss is granted as to the § 523(a)(2)(A) and § 523(a)(4) causes of action, and the complaint is dismissed without prejudice; the motion is otherwise denied;

IT IS FURTHER ORDERED that the plaintiff may file and serve an amended complaint no later than September 20, 2022, and provided that it also files a redline copy showing all modifications of the dismissed complaint.

IT IS FURTHER ORDERED that no later than October 18, 2022, the defendant shall file and serve a responsive pleading or motion. The parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.

IT IS FURTHER ORDERED that if defendant fails to file timely a responsive pleading or motion, the plaintiff shall seek entry of the Murray Todd Petersens's default.

IT IS FURTHER ORDERED that if defendant files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on November 22, 2022.

16. 22-20581-A-7 **IN RE: MURRAY PETERSEN**
22-2034

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
7-18-2022 [13]

KING V. PETERSEN

Tentative Ruling

If the filing fee has not been paid in full by the time of the hearing, the case may be dismissed without further notice or hearing.

17. 22-20581-A-7 **IN RE: MURRAY PETERSEN**
22-2034 CAE-1

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

KING V. PETERSEN
KURTRINA KING/ATTY. FOR PL.

Final Ruling

The status conference is continued to November 1, 2022, at 1:30 p.m. The plaintiff has not served the summons and complaint. Or at least the record does not so reflect. The summons issued June 29, 2022, is no longer viable. Fed. R. Bankr. P. 7004(e). Not later than September 13, 2022, the plaintiff shall obtain a re-issue summons. When the Clerk of the Court re-issues the summons it shall set a status conference for November 1, 2022, at 1:30 p.m. Not later than 7 days after obtaining the re-issued summons and complaint the plaintiff shall cause the summons and complaint to be served on defendant Murray Todd Petersen and counsel, Galen M. Gentry, Fed. R. Bankr. P. 7004(g), and shall file the certificate of service with the Clerk of the Court. A civil minute order shall issue.