UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 24, 2020 at 11:00 a.m.

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1. **18-25001-E-7** **JOSEPH AKINS** **CONTINUED MOTION TO MODIFY**
18-2187 **NBL-1 Sheila Gropper Nelson** **SCHEDULING ORDER**
BLACK V. AKINS **7-2-20 [87]**
1 thru 3

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor on July 2, 2020. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Modify Scheduling Order is granted, and the Scheduling Order is modified as detailed below.

Dominique Black ("Plaintiff ") commenced this action on November 13, 2018 by filing an adversary complaint objecting to the discharge of Debtor and Defendant Joseph H. Akins ("Defendant") pursuant to 11 U.S.C. § 727 as well as seeking a determination of the dischargeability of debts pursuant to 11 U.S.C. § 523.

Plaintiff respectfully requests this Court issue an order modifying the Scheduling Order filed in the above-captioned adversary proceeding on October 29, 2019 by continuing the close of non-expert discovery for (90) days following hearing on this motion.

REVIEW OF THE MOTION AND DECLARATION

Plaintiff's request is based on his ability to meaningfully participate in this case, including assisting in preparation of discovery due to business responsibilities and being personally affected by COVID-19.

Plaintiff testifies that he was unable to assist in the preparation of discovery requests and taking the deposition of Defendant due to increase of responsibility in the operations of his business (with a reduced workforce due to stay at home orders) which provides staffing and support for bio-pharmaceutical companies working to provide virus and disease prevention vaccines, medications, and treatments; the death of Plaintiff's mother due to the COVID-19 virus; and lastly, Plaintiff's office was closed due to the state's and county's shelter in place orders between mid-March 2020 and May 2020 blocking Plaintiff's access to this case's litigation files. Declaration, Dckt. 89.

Plaintiff argues that he has been diligently prosecuting this case. During the present COVID-19 period, Plaintiff provided responses to Defendant's discovery requests; and was preparing supplemental responses to requests before the passing of his mother due to COVID-19 (for whom he was the primary caregiver). *Id.*, at ¶¶ 17-25. Plaintiff further argues that he believed he had sufficient time to propound discovery and take Defendant's deposition in person prior to the May 2020 deadline but that the COVID-19 pandemic was unforeseeable. *Id.*, at ¶ 30. The closure of offices and the increase in operations for his business prevented Plaintiff from committing his resources at the level he anticipated including conducting discovery between mid-March and deadline of May 30. *Id.*, at ¶ 13.

Plaintiff seeks the requested extensions in order to propound paper discovery, conduct third-party discovery, and conduct an in-person deposition of Defendant. The only discovery completed so far in this case is Defendant's propounded paper discovery requests in 2019.

Plaintiff asserts that the modification of the scheduling order will not prejudice Defendant or impact the court's calendar on the basis that no trial date has been set in this matter and the pre-trial conference is not scheduled until October 29, 2020.

DEFENDANT'S OPPOSITION

Defendant filed an Opposition on July 29, 2020 opposing the modification of the Scheduling Order on the basis that Plaintiff's Motion is untimely and fails to show good cause for such change and the facts as presented by Plaintiff show an absence of diligence. Dckt. 93.

First, the dates were previously agreed to by all the parties and the order was set back in October 2019. Defendant cannot show good cause neither on his declaration or the Motion as to why no discovery was propounded between October 2019 and February 2020, well before the March 21, 2020 stay-at-home order.

Moreover, Plaintiff with knowledge of the impediments listed above, did not seek to modify the time line before the cutoff date of May 30, 2020. Defendant argues that, as shown by Plaintiff's motion, the failure to propound discovery and seek timely modification of the order was an intentional and deliberate tactic. Defendant contends that a review of the court dockets, including those for appellate courts, identify that Plaintiff was actively participating as a pro per appellant during the

relevant time period and that delay is a persistent pattern he repeats over and over again.

Defendant further contends that regardless of Plaintiff's issues nothing interfered with counsel's ability, in those five months, to have propounded discovery or to seek a modification of the discovery deadline cutoff date.

Defendant notes that despite knowledge of the impediments identified by Plaintiff, nothing shows why the instant motion to modify the scheduling order was not sought before July 2, 2020 or before the May 30, 2020 cutoff date. Defendant contends that the instant motion is an abuse of court resources and is not justified as it should have been filed before the deadline expiration.

PLAINTIFF'S REPLY

Plaintiff filed a Reply on August 6, 2020. Dckt. 95. Plaintiff asserts that Defendant passed on January 1, 2020, and yet Defendant's Counsel failed to notify and actively concealed this information from Plaintiff. Plaintiff notes that a Notice of Death was filed in the bankruptcy case on June 23, 2020 disclosing that Defendant had passed away "within the last 60 days" of the Notice, or on or after April 24, 2020. Further noting that the Proof of Service for the Notice was served on Special Notice party Erin McCartney and Chapter 7 Trustee Sheri Carrello but not served upon Plaintiff or Plaintiff's Counsel, and that no such notice was filed in the present adversary proceedings.

On May 28, 2020, counsel for Plaintiff sent an email to Defendant's Counsel asking if Defendant would stipulate to a modification of the Court's October 29, 2019 Scheduling Order and inquiring as to taking Defendant's deposition. In her Response, Defendant's Counsel opposed the modification and failed to inform Plaintiff about Defendant's passing having had knowledge of it since at least April 24, 2020.

On June 3, 2020, counsel for Plaintiff received Defendant's responses to Plaintiff's paper discovery which included a notation that Defendant was "(deceased)" but no other statement regarding his death. *Id*., Exhibit 3, at p. 16.

On July 21, 2020, after Defendant's Counsel failed to reply to an email inquiring as to Defendant, Plaintiff's counsel again emailed Defendant's Counsel to which she replies "Nick that information was provide [sic] months ago." *Id.*, Exhibit 4, at p. 21. Through a series of properly authenticated emails, Plaintiff documents his efforts to obtain additional information such as date that Counsel was informed of her client's passing, who was the estate's representative, and whether probate proceedings had initiated. See, *Id.*, at pp. 21-36. According to Plaintiff, the emails show Defendant's Counsel's lack of answers and delays in providing information. *Id*.

At the time Plaintiff filed his Motion, Plaintiff was requesting additional time to complete paper discovery and conduct Defendant's deposition. However, in light of Defendant's passing, Plaintiff requires additional time to investigate any other witnesses that may be called by Plaintiff or Defendant as witnesses or rebuttal witnesses now that Defendant is unavailable to testify; investigate whether Defendant made any statements, sworn or unsworn, to any other person at or before the time of his death back on January 1, 2020; and investigate Defendant's estate and any proposed or completed transfers of property since Defendant's death.

As to Defendant's argument that Plaintiff has not shown good cause to warrant a

modification of the order, Plaintiff argues that Plaintiff has been diligent in prosecuting this case by assisting the court in creating said scheduling order taking into account the time needed for the limited discovery sought without foreseeing the occurrence of the present health crisis. Moreover, Plaintiff has been diligently prosecuting the case on the basis that between November 2019 and December 2019 Plaintiff was working on responses to Defendant's discovery. Also, in addition to this litigation matter, Plaintiff has been working in a separate but related litigation matter that was on appeal in the First District Court of Appeals, Case No. A155428, that required spending significant time preparing appellate briefs due on January 31, 2020.

Thus, Plaintiff requests the court modify the scheduling order and continue non-expert discovery for ninety (90) days following hearing on this Motion or ninety (90) days following hearing on Plaintiff's Motion to Substitute, presently scheduled for September 24, 2020, so Plaintiff may conduct additional investigation and discovery into Defendant's affairs since his passing. Plaintiff further requests the corresponding dates for dispositive motions and the pre-trial conference in this action be continued as determined by the Court.

DECISION

Though Defendant's counsel was aware of Debtor's death sometime during the period of April 2020 and June 23, 2020, (18-25001; Notice of Death, Dckt. 47), counsel has taken no action in this case to get a "replacement client." Federal Rule of Civil Procedure 25, which is incorporated into Federal Rule of Bankruptcy Procedure 7025, provides that if a party dies during the litigation, then the court may order the substitution of the proper party. Fed. R. Civ. P. 25(a). Any party or the decedent's successor in interest may seek such substitution, but the deadline to do so does not begin to run until a statement noting the death is served within the adversary proceeding. *Id.*

Here, the death of the Defendant was not disclosed to the Plaintiff nor to the court in this Adversary Proceeding. When Defendant's counsel filed and served the Notice of Death in the bankruptcy case in June 2020, Defendant's counsel states that she served it on Erin McCartney, Esq., who requested special notice, and the Trustee.

A copy of the Death Certificate is attached to the Notice of Death in the Bankruptcy Case. The Death Certificate states that the Defendant died on January 1, 2020. 18-25001; Exhibit A, Dckt. 48. The Notice of Death was not filed until June 23, 2020.

Defendant's counsel did not disclose in this Adversary Proceeding that the Defendant had died. Defendant's death has left counsel without a client for whom she could prosecute the defense. This left the Plaintiff in limbo.

The late Defendant's counsel had not come forward with a successor to be appointed, it appears that it will be up to the Plaintiff to bring that motion, but Plaintiff did so. Motion, Dckt. 100. Pursuant thereto the court has appointed Joseph H. Akins, Jr., Son of deceased Defendant-Debtor, Joseph H. Akins, Sr. as Defendant-Debtor's successor representative to adjudicate Defendant-Debtor's rights, interests, and obligations in this Adversary Proceeding. Joseph Akins, Jr., is represented by Sheila Gropper Nelson, Esq., in this Adversary Proceeding.

Defendant-Debtor having passed away in January 2020 and no representative to take his place in this litigation being appointed until September 2020, the Motion is granted and the deadline for

completing non-expert discovery is extended to and including January 30, 2021.

The court sets the following additional deadlines and adjusted dates based on the above relief and that requested in DCN: NBL-002 (Dckt. 115).

- Expert Discovery shall be completed by, including the hearing of any discovery motions, by March 30, 2021. [Relief Requested in Motion DCN: NBL-002, Dckt. 116]

- Dispositive Motions shall be heard by May 27, 2021.

- The Pre-Trial Conference shall be conducted at 2:00 p.m. on August 4, 2021.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Discovery Deadline in this Adversary Proceeding filed by Plaintiff Dominique Black having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the dates and deadlines in the court's Scheduling Order, Dckt. 85, are modified as follows:
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> 1. Non-Expert Discovery shall be completed by, including the hearing of any discovery motions, by January 30, 2021.
>
> 2. Expert Discovery shall be completed by, including the hearing of any discovery motions, by March 30, 2021. [Relief Requested in Motion DCN: NBL-002, Dckt. 116]
>
> 3. Dispositive Motions shall be heard by May 27, 2021.
>
> 4. The Pre-Trial Conference shall be conducted at 2:00 p.m. on August 4, 2021.

2. 18-25001-E-7 JOSEPH AKINS MOTION TO MODIFY SCHEDULING
18-2187 NBL-2 Sheila Gropper Nelson ORDER
BLACK V. AKINS 8-26-20 [116]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, on August 26, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Modify the Scheduling Order is granted.

Dominique Black ("Plaintiff ") commenced this action on November 13, 2018 by filing an adversary complaint objecting to the discharge of Debtor and Defendant Joseph H. Akins ("Defendant") pursuant to 11 U.S.C. § 727 as well as seeking a determination of the dischargeability of debts pursuant to 11 U.S.C. § 523.

Plaintiff respectfully requests this Court issue an order modifying the Scheduling Order filed in the above-captioned adversary proceeding on October 29, 2019 with a new date for close of expert discovery based on the death of Debtor-Defendant.

DISCUSSION

Plaintiff argues that modification of the order for expert discovery is warranted on the premise that Debtor's death and subsequent non-disclosure may reveal additional facts and information that Plaintiff could not have foreseen or anticipated that may require the use of an expert witness. Plaintiff highlights that confirmation of Debtor's death was not received until July 21, 2020, three days prior to the close of expert testimony.

Plaintiff filed a Motion to Modify the Scheduling Order as it pertained to non-expert testimony on July 2, 2020. This was before confirmation that Debtor had passed away back in January

2020. The hearing on that Motion was continued as Counsel for Debtor had failed to file a Motion to Substitute and continued communicating with the court and Plaintiff without disclosing Debtor's death.

The late Defendant's counsel had not come forward with a successor to be appointed, it appears that it will be up to the Plaintiff to bring that motion, and Plaintiff did so. Motion, Dckt. 100. Pursuant thereto the court has appointed Joseph H. Akins, Jr., the son of the late Defendant-Debtor, Joseph H. Akins, Sr. as Defendant-Debtor's successor representative to adjudicate Defendant-Debtor's rights, interests, and obligations in this Adversary Proceeding. Joseph H. Akins, Jr., is represented by Sheila Gropper Nelson, Esq., in this Adversary Proceeding.

Defendant-Debtor having passed away in January 2020 and no representative to take his place in this litigation being appointed until September 2020, the Motion is granted and the deadline for completing expert discovery is extended to and including March 30, 2021.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Modify Scheduling Order filed by Dominique Black ("Plaintiff ") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Modify Scheduling Order as it pertains to expert discovery is granted, with the deadline extended until March 30, 2021.

3. **18-25001-E-7** **JOSEPH AKINS** **MOTION TO SUBSTITUTE PARTY, AS**
18-2187 **NBL-2** **Sheila Gropper Nelson** **TO JOSEPH H. AKINS**
BLACK V. AKINS **8-7-20 [100]**

Final Ruling: No appearance at the September 24, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (Successor in Interest) and Debtor's Attorney on August 7, 2020. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Substitute has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Substitute is granted.

Plaintiff, Dominique Black, seeks an order approving the motion to substitute Joseph H. Akins, Jr., ("Son" of Defendant-Debtor) for the deceased Defendant-Debtor, Joseph H. Akins, Sr. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 7025.

Defendant-Debtor filed for relief under Chapter 7 on August 9, 2018. On January 1, 2020, Defendant-Debtor, passed away. Defendant-Debtor's counsel identifies Son as the lawful successor and representative of Defendant-Debtor.

The Non-Opposition has been filed by Sheila Gropper Nelson, Esq., counsel for the deceased Defendant-Debtor. Dckt. 122. The pleading states that she is now proceeding to continue that representation by serving as counsel for Son.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, Plaintiff requests authorization that Son be substituted in for the deceased Defendant-Debtor and to perform the obligations and duties of the deceased party in addition to performing his own obligations and duties. A Suggestion of Death was filed on June 23, 2020 in Debtor's underlying bankruptcy case, Case No. 18-25001. Dckt. 47. Joseph H. Akins, Jr. is the son of the deceased party and is the successor's heir and lawful representative.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing

> of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

DISCUSSION

Plaintiff's Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death in Debtor's underlying bankruptcy case, Case No. 18-25001. Dckt. 47.

Son, as the Interested Party, filed a Non-Opposition wherein he does not oppose to the substitution so that he may defend the action pursuant to Rule 25(b). He has obtained and is being represented by the same counsel as the deceased Defendant-Debtor.

The Motion is granted and, Joseph H. Akins, Jr., ("Son" of Defendant-Debtor) for the deceased Defendant-Debtor, Joseph H. Akins, Sr. is substituted in as the real party in interest defendant in this Adversary Proceeding.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by the Plaintiff, Dominique Black ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Joseph H. Akins, Jr., the son of the late Defendant-Debtor, Joseph H. Akins, Sr. is substituted in as the deceased Defendant-Debtor's successor representative to adjudicate Defendant-Debtor's rights, interests, and obligations in this Adversary Proceeding.

4. **20-20978-E-7** **JEFFREY ANDERSEN** **MOTION TO AMEND**
20-2111 **RK-3 Jeffrey Meisner** **MOTION/APPLICATION TO DISMISS**
4 thru 5 **CAUSE(S) OF ACTION FROM**
KELLY V. ANDERSEN ET AL **COMPLAINT**
8-23-20 [50]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff on August 23, 2020. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Amend the Motion for Partial Judgment on the Pleadings is denied.

Gregory Kelly ("Plaintiff") filed the Complaint in this Adversary Proceeding on June 1, 2020, against Jeffrey A. Andersen, Defendant-Debtor and Bridgette A. Andersen, Non-Debtor Defendant.

Plaintiff seeks non-dischargeability of debt under 11 U.S.C. § 523, to determine hypothetical discharge of non-filing spouse under 11 U.S.C. § 523, denial of discharge under § 727, and for declaratory relief under 28 U.S.C. § 2201. Dckt. 11. The grounds upon which these claims are based are summarized as follows:

A. Defendant-Debtor Jeffrey Andersen accepted investment from individuals under the name of Andersen Enterprises, an unregulated and unregistered investment fund. Defendant-Debtor did not register as a financial advisor or broker.

B. Robert Beck ("Beck") signed up for Andersen Enterprises's Private Group Success Program on June 2, 2012.

C. Defendant-Debtor represented to Beck that he would receive $2,000 a month return on a $20,000 investment. The program's contract provided for rebates, reports, and termination deadlines.

D. On June 11, 2012, Andersen Enterprises received $20,000 from Beck.

E. Beck received weekly emails about the value of his investment account and reported returns.

F. On October 2, 2012 Beck received an email from Defendant-Debtor stating that profits and pay-outs would be calculated monthly because his program had grown too large for weekly pay-outs.

G. After October 2, 2012 Beck stopped receiving monthly emails on the status of his account. On December 15, 2012, Beck decided to close his account and demanded his money back.

I. Defendant-Debtor could not pay Beck back because he had spent the $20,000 investment on personal expenses and other pay-outs to other investors.

J. After 10 months of no refunds to Beck, Defendant eventually signed a Promissory Note to Beck for $31,625.

K. Defendant-Debtor paid Beck all but $6,500 of the contract and then ceased all payments and communications.

Motion for Judgment on the Pleadings

On August 23, 2020, "Defendant" (the Motion not identifying which defendant brings the Motion) filed the instant Motion for a Partial Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). Dckt. 45, 50. "Defendant" requests the court dismiss the second cause of action for fraud committed while a fiduciary.

"Defendant" argues that Plaintiff cannot show that "Defendant" was a fiduciary as the agreement between "Defendant" and the original investor does not support that there was an express trust relationship between the two. Indeed, "Defendant" argues that Plaintiff cannot show this relationship because no express trust existed and the agreement between "Defendant" and the original investor did not contain sufficient words creating a trust. Further arguing that "Defendant" was part of a team at Andersen Enterprises and the money was turned over to others within the investment fund who then made investments.

"Defendant" argues that Section 523(a)(4) requires that an express trust relationship must exist for there to be fiduciary duties. Because the agreement did not create a trust, "Defendant" could not have been acting in a fiduciary capacity towards the original investor. No other fiduciary relationship existed since at the time of the investment "Defendant" was not a licensed broker, was not governed by any regulatory body, nor is there any relevant case that creates an express trust when an unregistered individual, such as "Defendant," invests the property of another.

OPPOSITION

Plaintiff filed an Opposition on September 10, 2020. Dckt. 78. Plaintiff argues the Motion should be denied in great part on the basis that a fiduciary relationship existed between Plaintiff and Defendant-Debtor based on the conduct with respect to the handling of client funds. Plaintiff points the court to the exception created in *In re Banks*, where the Ninth Circuit held that although there was no express trust relationship between the attorney and his client, a fiduciary duty of loyalty was created when the attorney placed the client's funds into his trust account. *Banks v. Gill Distribution Ctrs., Inc.* (*In re Banks*), 263 F.3d 862, 871 (9th Cir. 2001). Adding that *In re Banks* established that the lack of a written express trust does not create an unequivocal defense to 523(a)(4).

Plaintiff further asserts that Defendant-Debtor's failure to register as a financial advisor or broker-dealer does not absolve him from fiduciary responsibility towards Plaintiff under California law for stockbrokers. Plaintiff cites to *Twomey v. Mitchum Jones & Templeton* where the court held that the stockbroker-customer relationship is fiduciary in nature and imposes on the broker a duty of good faith. *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App. 2d 690, 709, 69 Cal. Rptr. 222, 236 (1968). Plaintiff asserting that he has presented prima facie evidence that Defendant failed to invest Beck's money and Defendant-Debtor's denial of such is sufficient to show that there are facts in dispute.

Lastly, Plaintiff argues that as a fiduciary relationship is not required for embezzlement, the Amended Complaint presents enough allegations for a finding of embezzlement, namely that Defendant-Debtor was using Beck's money for his own personal expenses. Thus, Defendant-Debtor's request to dismiss the cause of action must be denied.

APPLICABLE LAW

Federal Rule of Civil Procedure 12(c) Standard

On a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the allegations of the non-moving party must be accepted as true, while the allegations of the moving party, which have been denied, are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle him to relief. *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). While the court must construe the complaint and resolve all doubts in the light most favorable to the plaintiff, the court does not need to accept as true conclusory allegations or legal characterizations. *Id*. (*citing General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988)).

A motion for judgment on the pleadings based on Federal Rule of Civil Procedure 12(c) is a functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b), requiring the same underlying analysis. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, for a complaint to withstand a Rule 12(c) motion for judgment on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint and whether it

contains the necessary detail to state a plausible claim for relief. *Id.* at 679. The factual content on the face of the complaint—not conclusory statements in the pleading—and reasonable inferences drawn from those facts must plausibly suggest that the plaintiff could be entitled to relief for the pleading to survive a Rule 12(c) motion. *See id.* at 677.

DISCUSSION

"Defendant" argues that an express trust is required for there to be a fiduciary relationship for purposes of Section 523(a)(4). Collier on Bankruptcy is most illuminating as to "Defendant's" argument:

> The language of section 523(a)(4) relates to "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." The phrase "while acting in a fiduciary capacity" clearly qualifies the words "fraud or defalcation" and not "embezzlement" or "larceny." The import of the grammatical structure is that the discharge exception applies even when the embezzlement or larceny was committed by someone not acting as a fiduciary. [FN.1.]
>
> ---
> FN.1. The House bill, H.R. 8200, reprinted in App. Pt. 4(d) infra, merely excepted debts for "embezzlement or larceny." The Senate bill, S. 2266, reprinted in App. Pt. 4(e) infra, excepted "debts for fraud incurred by the debtor while acting in a fiduciary capacity or for defalcation, embezzlement or misappropriation." The final version of paragraph (4) represents a compromise, combining both the House and Senate views by excepting debts for fraud or defalcation while acting in a fiduciary capacity or debts resulting from embezzlement or larceny.
> ---

4 Collier on Bankruptcy P 523.10 (16th 2020). Here, Plaintiff is alleging a claim for embezzlement. Amended Complaint, Dckt. 11, ¶ 73. Whether or not Plaintiff has pleaded sufficient allegations as it relates to the embezzlement is not at issue as it pertains to Defendant's partial judgment on the pleadings, but whether Plaintiff must show a fiduciary relationship. This relationship not being an element for embezzlement or larceny under Section 523(a)(4), the court cannot dismiss the second cause of action.

The Second Cause of Action, which including the full text of 11 U.S.C. § 523(a)(4), states the following specific grounds (identified by Complaint paragraph number):

> 72. When [Defendant-Debtor] accepted Beck's PSGP contract and $20,000 investment in June of 2012, [Defendant-Debtor] accepted the role of Beck's financial fiduciary.
>
> 73. [Defendant-Debtor] failed to honor that fiduciary role, by distributing Beck's funds for his personal use, constituting embezzlement and larceny.
>
> 75. When Beck demanded his money back in December 2013, [Defendant-Debtor was unable to repay him in full, because [Defendant-Debtor] Jeff had already

spent Beck's money.

76. Several years later, in February of 2015, [Defendant-Debtor] still owed $6,500, and Beck ultimately assigned all rights and interest in this debt to Kelly.

Amended Complaint, Dckt. 11.

Clearly, the 11 U.S.C. § 523(a)(4) grounds stated is embezzlement or larceny, for which there is no "fiduciary relationship" required.

In reviewing the assertions by "Defendant" as to what "fiduciary relationship" is required, "Defendant" asserts there must be an "express trust" for there to be an 11 U.S.C. § 523(a)(4) "fiduciary capacity." Collier on Bankruptcy provides a discussion of this concept, stating:

> Certain relationships are generally recognized as involving fiduciary obligations within the meaning of section 523(a)(4). Bank officers, executors and administrators, guardians, receivers, the president of a private corporation entrusted with funds for a particular purpose, the sole manager of a joint venture's affairs and, of course, other technical trustees have been held to be acting in a fiduciary capacity within the meaning of this provision.

4 Collier on Bankruptcy P 523.10 (16th 2020). These are not "express trusts," but relationships for which a person stands in a "fiduciary capacity." Looking at *Ragsdale v. Haller*, 780 F.2d 794 (9th Cir. 1986), in which the Ninth Circuit concluded that "mere" partners in a partnership are fiduciaries to the other partners.

> California courts, however, have raised the duties of partners beyond those required by the literal wording of § 15021. In California,
>
> > partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his co-partner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.
>
> *Leff v. Gunter*, 33 Cal. 3d 508, 514, 658 P.2d 740, 744, 189 Cal. Rptr. 377, 381 (1983) (quoting *Page v. Page*, 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41 (1961)). See also 6 Witkin, Summary of California Law 4279 (8th ed. 1973). 68 C.J.S. Partnership § 76 & n.34 (relationship of trust held to exist between partners in California without reference to statute (1950 & 1985 Supp.) This is more than just a fiduciary relationship created in response to some wrongdoing; California has made all partners trustees over the assets of the partnership. **Accordingly, we hold that California partners are fiduciaries within the meaning of § 523(a)(4) and that Haller's debt to Ragsdale is non-dischargeable**.

Ragsdale v. Haller, 780 F.2d 794, 796-797 (9th Cir. 1986). Clearly more than "express trusts" fall within the fiduciary capacity provisions of 11 U.S.C. § 524(a)(4). However, it is not asserted that the

investment agent-client relationship is one of such fiduciary quality, but that Defendant-Debtor embezzled money from Plaintiff.

The Motion to dismiss is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Judgment on the Pleadings filed by Jeffrey A. Andersen and Bridgette A. Andersen ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

5. **20-20978-E-7** **JEFFREY ANDERSEN**
20-2111 **RK-2 Jeffrey Meisner**

KELLY V. ANDERSEN ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR JUDGMENT ON THE PLEADINGS
8-21-20 [38]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff on August 21, 2020. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is denied as to all claims and causes of action except the Motion is granted for the following:

(1) Judgment will be entered for Defendant-Debtor on the Seventh Cause of Action asserting that the discharge should be denied pursuant to 11 U.S.C. § 727(a)(4)(B) for presenting or using a false claim;

(2) Judgment will be entered for Defendant-Debtor on the Eighth Cause of Action seeking a "declaratory judgment" as to the amount owed on a judgment entered by and enforceable in the Superior Court for the State of California, the federal court not issuing collateral orders purporting to collaterally determine the amount owing on a judgment to be enforced in the state court.

Jeffrey A. Andersen ("Defendant-Debtor") moves for the court to dismiss all claims against it in Gregory Kelly's ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. Defendant Jeffrey Andersen accepted investment from individuals under the name of Andersen Enterprises, an unregulated and unregistered investment fund. Defendant did not register as a financial advisor or broker.

B. Robert Beck ("Beck") signed up for Andersen Enterprises's Private Group Success Program on June 2, 2012.

C. Defendant represented to Beck that he would receive $2,000 month return on a $20,000 investment. The program's contract provided for rebates, reports, and termination deadlines.

D. On June 11, 2012, Andersen Enterprises received $20,000 from Beck.

E. Beck received weekly emails about the value of his investment account and reported returns.

F. On October 2, 2012 Beck received an email from Defendant stating that profits and pay-outs would be calculated monthly because his program had grown too large for weekly pay-outs.

G. After October 2, 2012 Beck stopped receiving monthly emails on the status of his account. On December 15, 2012, Beck decided to close his account and demanded his money back.

I. Defendant could not pay Beck back because he had spent the $20,000 investment on personal expenses and other pay-outs to other investors.

J. After 10 months of no refund to Beck, Defendant eventually signed a Promissory Note to Beck for $31,625.

K. Defendant paid Beck all but $6,500 of the contract and then ceased all payments and communications.

APPLICABLE LAW

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

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

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

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

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff refers to exhibits attached to the original complaint that are no longer operative under the Amended Complaint.

B. Plaintiff incorrectly stated the proper jurisdictional grounds for the court to adjudicate Plaintiff's claims and states the proper jurisdiction is pursuant to 28 U.S.C. Sections 1334, 157(b)(2)(I), and (b)(2)(J).

C. The Amended Complaint is filled with conclusory and implausible allegations that do not meet the requirements for establishing the elements for the following causes of action: First Cause of Action for Fraud; Fourth Cause of Action for Concealment of Property; and Fifth Cause of Action for Concealment of, or Failure to keep Records.

D. Plaintiff has failed to establish that a fiduciary relationship existed, thus the Second Cause of Action for Fraud or Defalcation while acting as a

fiduciary fails as they are nothing more than conclusory statements.

E. Defendant Bridgette should be dismissed for lack of subject matter jurisdiction.

F. Plaintiff's allegations regarding false oaths are conclusory and rely on non pleaded evidence. Further, the purported false oaths were not made knowingly or fraudulently, but product of inadvertent actions.

G. Moreover, the audio alluded to under section B of the Sixth Cause of Action for False Oaths, are unintelligible in that they are not statements in writing, impossible to respond as the terms used are undefined, and Defendant does not know what audio exists in connection with this case.

H. Plaintiff purports to usurp Debtor's role as petitioner and continues to allege without evidence that Debtor's $100,000 claim against Plaintiff is false and scheduled for purposes of harassing Plaintiff.

I. Lastly, Plaintiff's Eighth Cause of Action for Declaratory Relief is inappropriate under 28 U.S.C. § 2201.

DISCUSSION

Exhibits to the Original Complaint

Defendant argues that he is unable to respond to the Amended Complaint because it refers back to evidence that became non-existent once the Amended Complaint was filed. As was discussed at a prior hearing, the pro se Plaintiff "thought" that he just needed to include the additional exhibits which were not included in the original Complaint.

The Complaint does incorporate the exhibit by reference, directing a person to Docket Entry No. 1 and then to the exhibit found at Docket Entry No. 1 in this Adversary Proceeding. The Exhibits are easily identifiable and included as exhibits the same way that the exhibits filed as Docket Entry No. 12 with the Amended Complaint are incorporated into the Amended Complaint.

The court finds that the exhibits identified in the Amended Complaint are filed therewith in this Adversary Proceeding and incorporated into the Amended Complaint as exhibits filed separately with the Amended Complaint.

Clearly there is no confusion, misunderstanding, or prejudice to Defendant-Debtor and counsel in having to click on two docket entry filings to get the exhibits rather than one extra docket entry filing in this Adversary Proceeding.

The exception to this is a footnote reference to the "Declaration of Gregory Kelly" that is liberally footnoted throughout the Amended Complaint. In reviewing this reference, it appears that this is cited as the Plaintiff's "testimony" in support of alleged facts. Such testimony is not provided as part of a Complaint, but testimony would be presented at trial. Defendant-Debtor does not provide "counter-testimony" in an answer, but only admit or deny the allegation. This reference is superfluous and does

not warrant granting the relief requested.

Incorrect Jurisdiction

Next, Defendant-Debtor drives home the point that the Amended Complaint cites to 28 U.S.C. § 157(b)(2) as "conferring jurisdiction." It is asserted that having cited the statute defining core matter proceeds, the court is powerless to adjudicate the claims in this Adversary Proceeding. Points and Authorities, p. 5:17-22; Dckt. 41.

First, the parties do not create or destroy federal court jurisdiction. As Defendant-Debtor's counsel well knows, and Defendant-Debtor then admits in the Points and Authorities, federal court jurisdiction exists for this Complaint and the claims arising under the Bankruptcy Code, 11 U.S.C. § 523(a)(2), (a)(4), pursuant to 28 U.S.C. § 1334. *Id.*

Federal Court jurisdiction properly exists for this court to issue all orders and final judgment in this core matter to determine the dischargeability of a debt.

Assertion that Allegations of Fraud are Conclusory and Implausible

Defendant-Debtor asserts that in the first cause of action mere "conclusions" are asserted. These "conclusions" are factual assertions that:

> Anderson Enterprises was never a legitimate investment firm, as represented

Amd. Complaint. ¶ 63; Dckt. 11. This appears to be a factual assertion that there was not a legitimate business operation by the Defendant-Debtor.

> Jeff's PGSP contract with Beck, along with his promise of $2,000 monthly returns, and ongoing emails of Beck's account balance constituted legal representations ("contracts").

Id., ¶ 64. This appears to be an allegation that the promises and representation made by Defendant-Debtor are part of a contract made between Defendant-Debtor and Beck.

> At the time Jeff made these contracts or representations about 2.5 % weekly returns on capital, he knew them to be false.

Id., ¶ 65. This appears to be a clear factual allegation that specific representations made by Defendant-Debtor are false. This is not a conclusion that "any and all statements made, at any time by Defendant-Debtor are false." Rather, Plaintiff has provided a specific alleged statement that is asserted to have been a false statement.

> Jeff intended to deceive Beck in order to gather money to pay his personal bills.

Id., ¶ 66. Again, a very specific allegation of what is asserted to be the reason underlying the alleged false representation, which Defendant-Debtor can clearly admit or deny.

> Beck justifiably relied on Jeff's representations in the PGSP contract and emails, including the $4,000 rebate, and promise of $2,000 monthly returns.

Id. ¶ 67. On this point, it states a conclusion that the reliance was justifiable. That is required as an element of 11 U.S.C. § 523(a)(2) fraud. It must be alleged, but is not "proved" in the complaint. Defendant-Debtor clearly knows what areas to conduct discovery as to the basis for the alleged justifiable reliance.

Plaintiff has in great detail, provided very specific allegations of what is asserted Defendant-Debtor did and what Beck (Plaintiff's predecessor in interest) did in their business relationship and other conduct. Defendant-Debtor focuses on one of the paragraphs which provides the required allegation of justifiable reliance, which is based on information in the first sixty-nine paragraphs in the Amended Complaint.

This is not a mere, threadbare *Twombly* situation where the complaint merely alleges, "defendant lied about something to me, I was defrauded, and defendant owes me some amount for fraud."

No Finding of Fraud Where Debtor is Not a Fiduciary

Defendant-Debtor then has a section titled above, stating that Plaintiff thinks that Beck "made" Defendant-Debtor a fiduciary, Beck could not, so there can be no claim for fraud. The First Cause of Action seeks to have a debt determined nondischargeable for fraud pursuant to 11 U.S.C. § 523(a)(2). There is no requirement that the fraud had to be committed by a fiduciary.

Allegations of Concealment are Conclusory

While having the above heading, it appears that Defendant-Debtor asserts that the allegations of concealment in the Forth Cause of Action are merely attempt to "shame" Defendant-Debtor and his wife - mere groundless and disparaging accusations set forth in paragraphs 86-95 of the Amended Complaint.

In looking at the Fourth Cause of Action, Plaintiff first assets that Defendant-Debtor and his wife co-mingled their monthly income and expenses, and each had personal knowledge of the finances. *Id.*, ¶ 84. This appears to be a straightforward factual allegation.

In paragraph 86 of the First Amended Complaint Plaintiff makes a factual allegation about what Defendant-Debtor and his wife claimed their income and assets to be in February 2019. The footnote references this information as coming from Exhibit H which has been filed with the Amended Complaint (Dckt. 12).

Paragraph 87 is a factual allegation about termination of Defendant-Debtor's employment.

Paragraph 88 is a factual allegation that in Response to Interrogatories Defendant-Debtor stated he was unemployed and professed to have no knowledge of his wife work or financial situation, includes tax refunds assigned to his wife. Again, those are factual allegations.

Paragraph 89 alleges that notwithstanding Defendant-Debtor stating he had no income, he

was not evicted from the rental home he was living in, the rent for which is alleged to be $2,100 a month.

Paragraph 90 makes a factual allegation that Defendant-Debtor's wife has undeclared income and cash savings from her "personal chef business."

Paragraph 91 and 92 allege that Defendant-Debtor has been the beneficiary of a joint bank account held with his deceased mother, which had money in it that he personally had access to use for Defendant-Debtor's personal expenses.

Paragraph 95 alleges that Defendant-Debtor has not accounted for a 2018 tax refund.

These are very clear, factual allegations which Defendant-Debtor can admit or deny. There is nothing shameful, scandalous, or disparaging - only allegations of specific conduct by Defendant-Debtor and his spouse.

Allegations of Failing to Keep Records
are Conclusory

Defendant-Debtor then asserts that the allegations that he has failed to keep records and thus his discharge should be denied are just conclusory and not factual. Looking at the allegations in paragraphs 97 through 107 of the Amended Complaint, the court notes that Plaintiff does first go through assertions relating to state court proceedings and the failure to produce documents. While indicating concealment, no specific documents are identified.

However, in paragraph 104, it is alleged that Defendant-Debtor failed to produce documents pursuant to a Rule 2004 subpoena. This 2004 examination is referenced to Case 20-20978, Defendant-Debtor's bankruptcy case, Dckt. 28, Exhibit G. Docket 28 is Plaintiff's 81 page Objection to Defendant-Debtor's Chapter 13 Plan. Exhibit G is an Order authorizing a 2004 Examination of the Defendant-Debtor by Plaintiff. The subpoena for the Rule 2004 Examination is included and calls for the production of numerous financial documents. The documents to be produced are clearly and specifically identified (not merely, "produce any and all financial documents").

Paragraph 106 and 107 allege that Defendant-Debtor's spouse operated an unlicensed business and has failed to keep financial records on her business, which financial information is relevant for the Defendant-Debtor as her spouse.

In Paragraph 108 it is specifically alleged that Defendant-Debtor asserts having no records of monies received from Beck for monies given for investments by Defendant-Debtor.

Allegations of False Oaths are Unintelligible,
Conclusory, and Not Factual

Under this heading, Defendant-Debtor accuses Plaintiff of trying to "shame" Defendant-Debtor and his wife for being married and not having a prenuptial agreement. Defendant-Debtor asserts that it is outlandish for Plaintiff to assert that Defendant-Debtor's wife had knowledge of the bankruptcy petition based on her signing a spousal waiver of exemptions.

The false oath allegations in the Sixth Cause of Action start with the allegation that Defendant-Debtor and his wife co-mingled their monthly income, assets, and expenses, and each had actual knowledge of the others financial and legal status. *Id.*, ¶ 112.

In paragraph 113, there is an allegation that Defendant-Debtor's spouse demonstrates her knowledge of the representations in the Bankruptcy Petition (it is not clear if this is a reference to the Petition itself or the Schedules and Statement of Financial Affairs) by signing the waiver of exemptions. Merely signing a waiver of exemptions does not necessarily demonstrate a knowledge of everything in the bankruptcy case, but does show that she was aware of the bankruptcy case and that it impacted her rights and interests.

Defendant-Debtor then asserts that the specifically identified alleged false statements identified in paragraph 114 are not false, but that there is some explanation. That "explanation" is for trial, not a motion for judgment based upon the Defendant-Debtor just stating that the allegations are not true.

Though making specific allegations that Defendant-Debtor can deny and then, if necessary provide at trial are not provable by Plaintiff, Defendant-Debtor asserts the right to prevail by merely responding that he, Defendant-Debtor, believes that allegations are frivolous.

Meeting of Creditors Audio

Defendant argues that the allegations made by Plaintiff under the False Oath cause of action are unintelligible and impossible to respond to as he seems to argue that he does not know about the audio recorded during the Meeting of Creditors. Moreover, Plaintiff argues that for a false oath the statements must be in writing.

Defendant-Debtor asserts that the alleged false oaths stated in Subsections B13-B18 of the Amended Complaint are unintelligible. In reading them, the court finds then "intelligible," clearly identifying the statement made at specific points at the First Meeting of Creditors, identifying the specific time marks in the recording where the statements were made. Each of these identify a specific statement which is asserted to be a false statement made under oath at the First Meeting of Creditors.

With respect to the assertion that such false statements under oath can only be made in writing, Collier on Bankruptcy elucidates on this point:

> [c] Oath Includes Statements in Schedules and at Examination
>
> The false oath that is a sufficient ground for denying a discharge may consist of (1) a false statement or omission in the debtor's schedules or **(2) a false statement by the debtor at an examination during the course of the proceedings.**

6 Collier on Bankruptcy P 727.04 (16th 2020) (Emphasis added). Thus, Defendant-Debtor's statement made at the Meeting of Creditors as an examination during the bankruptcy may be statements included to prove false oaths. In any case, even if a writing were required, Plaintiff may obtain a transcript of the Meeting of Creditors referred to in the Amended Complaint.

Alleged False Statement of $100,000
Debt on Schedules

Defendant-Debtor makes several assertions that Plaintiff asserting that listing a $100,000 obligation owed by Plaintiff to Defendant-Debtor is a false oath is meritless. Plaintiff asserts in the Seventh Cause of Action in the Amended Complaint that listing a $100,000 potential tort lawsuit against Plaintiff on the Schedules is presenting or using a false claim as provided in 11 U.S.C. § 727(a)(4)(B).

While Defendant-Debtor pokes at this, asserting "no, it's not false," Defendant-Debtor fails to recognize what the statute says. Plaintiff equally does not understand this section of the Bankruptcy Code.

Defendant-Debtor did not present or use a false claim, but listed an asset on the Schedules which Plaintiff disputes. A claim is an obligation owed to a creditor, 11 U.S.C. § 101(5), (10). A "False Claim" could be one that is filed by a debtor on behalf of a creditor or stated as undisputed on the schedules in a Chapter 11 case (for which no proof of claim is then required). A debtor would use a "false claim" to improperly divert monies from the bankruptcy estate to someone who was not owed money by the debtor and did not have a claim. It does not include a debtor listing as an asset an obligation alleged to be owed by someone to the debtor which that other person disputes.

The court grants the motion as to the Seventh Cause of Action for the Defendant-Debtor, and judgment shall be entered thereon denying the relief requested pursuant to 11 U.S.C. § 727(a)(4)(B) by Plaintiff.

Eighth Cause of Action for Declaratory Relief

Defendant-Debtor asserts that in the Eighth Cause of Action Plaintiff seeks "declaratory relief" that based on the Proof of Claim filed in this case Defendant-Debtor owes Plaintiff $11,171.79.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. [FN.1.] "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. §2201,

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in

> section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Here, Plaintiff already has a state court judgment and the purpose of this Adversary Proceeding is to have that judgment determined to be nondischargeable.

In the Eighth Cause of Action, it appears Plaintiff seeks a "declaration" of the amount due under the judgment of another court. That is not proper declaratory relief. The judgment is entered, the song has been sung, and, to the extent determined nondischargeable, Plaintiff will enforce that judgment. If a dispute arises as to what is owed under the state court judgment in the future, the state court issuing that judgment will make such determination on the judgment issued by that court. This court does not make collateral "declaratory" judgment opining as to what is owed on another court's judgment. [FN. 2]

FN. 2. Proof of Claim 2-2 filed in Defendant-Debtor's bankruptcy case, 20-20978 has attached to it a copy of the state court judgment and is clearly based on the state court judgment.

The court grants the motion as to the Eighth Cause of Action for the Defendant-Debtor, and judgment shall be entered thereon denying the declaratory relief requested by Plaintiff to collaterally "declare" the amount owing and enforceable on a judgment entered by the Superior Court of California for future enforcement in that court.

The Motion to Dismiss Adversary Proceeding is denied as to all other claims in the First Amended Complaint and relief requested in the Motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Jeffrey A. Andersen and Bridgette A. Andersen ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and

good cause appearing,

IT IS ORDERED that the Motion to Dismiss Adversary Proceeding is denied as to all claims and causes of action except the Motion is granted for the following:

(1) Judgment will be entered for Defendant-Debtor on the Seventh Cause of Action asserting that the discharge should be denied pursuant to 11 U.S.C. § 727(a)(4)(B) for presenting or using a false claim;

(2) Judgment will be entered for Defendant-Debtor on the Eighth Cause of Action seeking a "declaratory judgment" as to the amount owed on a judgment entered by and enforceable in the Superior Court for the State of California, the federal court not issuing collateral orders purporting to collaterally determine the amount owing on a judgment to be enforced in the state court.

FINAL RULINGS

6. **17-26125-E-7** **FIRST CAPITAL RETAIL, LLC Gabriel Liberman** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT 3-20-20 [19]**
19-2115

HUSTED V. ESBF CALIFORNIA, LLC

Final Ruling: No appearance at the September 24, 2020 Status Conference is required.

Plaintiff's Atty: Aaron A. Avery
Defendant's Atty: Michael W. Davis; Thomas R. Phinney

Adv. Filed: 9/11/19
Answer: none
Amd. Cmplt. Filed: 3/20/20
Answer: none

Nature of Action:
Recovery of money/property - preference
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 9/3/20 to allow the Parties time to file and obtain approval of the reported settlement of the issues in this Adversary Proceeding.

The Status Conference for this Adversary Proceeding is continued to 11:00 a.m. on November 12, 2020, to allow the Parties to consummate the Settlement Agreement.

SEPTEMBER 17, 2020 JOINT STATUS REPORT

On September 17, 2020, the parties filed a Joint Status Report informing the court that the Motion to Approve their Settlement Agreement has been filed (DCN: HSM-18) and set for hearing September 24, 2020 at 10:30 a.m.

Once approved, Plaintiff-Trustee will dismiss the instant Adversary Proceeding within five days after receiving full payment and Defendant will withdraw its Proofs of Claim. Parties request that the hearing on the Motion to Dismiss and the Status Conference be continued to November 12, 2020 at 11:00 a.m. or to a later date approximately six months from September 24, 2020 and that with the

exception of a status report a week prior to the continued hearing on this motion, no further briefing shall be required and the continued hearing for the Motion to Dismiss shall be treated as a status conference.

7.	**17-26125-E-7** **19-2115**	**FIRST CAPITAL RETAIL, LLC PP-1 Gabriel Liberman**	**CONTINUED MOTION TO DISMISS CAUSE(S) OF ACTION FROM AMENDED COMPLAINT AND/OR MOTION FOR MORE DEFINITE STATEMENT** **4-3-20 [22]**
		HUSTED V. ESBF CALIFORNIA, LLC	

Final Ruling: No appearance at the September 24, 2020 Status Conference is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Plaintiff-Trustee on April 3, 2020. By the court's calculation, 132 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Cause(s) of Action from Amended Complaint and/or Motion for a More Definite Statement is continued to 11:00 a.m. on November 12, 2020, to allow the Parties to consummate the Settlement Agreement.

SEPTEMBER 17, 2020 JOINT STATUS REPORT

On September 17, 2020, the parties filed a Joint Status Report informing the court that the Motion to Approve their Settlement Agreement has been filed (DCN: HSM-18) and set for hearing September 24, 2020 at 10:30 a.m.

Once approved, Plaintiff-Trustee will dismiss the instant Adversary Proceeding within five days after receiving full payment and Defendant will withdraw its Proofs of Claim. Parties request that the hearing on the Motion to Dismiss and the Status Conference be continued to November 12, 2020 at

11:00 a.m. or to a later date approximately six months from September 24, 2020 and that with the exception of a status report a week prior to the continued hearing on this motion, no further briefing shall be required and the continued hearing for the Motion to Dismiss shall be treated as a status conference.

AUGUST 27, 2020 JOINT STATUS REPORT

On August 27, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 24, 2020 at 11:00 a.m. on the basis that a settlement agreement is now finalized and has been executed by all parties., and the parties anticipate that the motion to approve the compromise will be set for September 24, 2020 at 10:30 a.m. Dckt. 52. Parties also request that with the exception of a status report a week prior to the continued hearing on this motion, no further briefing shall be required and the continued hearing shall be treated as a status conference. *Id.* Moreover, parties request that the specially set Status Conference on the Adversary Proceeding should be continued to September 24, 2020 at 11:00 a.m. *Id.*

ESBF California, LLC ("Defendant") moves for the court to dismiss the First, Third, Fourth, and Fifth Claims for Relief against it in Kimberly J. Husted's ("Plaintiff-Trustee") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

JULY 29, 2020 JOINT STATUS REPORT

On July 29, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 3, 2020 at 11:00 a.m. on the basis that a draft of their settlement agreement has been prepared and has been circulated for revisions and the parties anticipate that the settlement agreement will be finalized within the next two (2) weeks, with a compromise motion to be filed shortly thereafter. Dckt. 47.

8. **20-20168-E-7** **SHAWN MYERS** **CONTINUED MOTION TO DISMISS**
20-2023 **Len Reynoso** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

ADRIAN, JR. V. MYERS **8-14-20 [23]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Chapter 7 Trustee, and Office of the United States Trustee on August 14, 2020. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 11:00 a.m. on November 12, 2020, to afford the parties additional time for their ongoing settlement negotiations.

9. **20-20175-E-11** **HERBERT MILLER** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
20-2137 **Judson Henry** **8-19-20 [9]**
MILLER V. WILMINGTON SAVINGS FUND SOCIETY, FSB ET AL

Final Ruling: No appearance at the September 25, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor and Debtor's Attorney, and as stated on the Certificate of Service on August 19, 2020. The court computes that 36 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $350.00 due on August 5, 2020.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

10. 17-22481-E-7 **WILLIAM LANDES** **MOTION FOR SUMMARY JUDGMENT**
20-2130 **MPD-1 Douglas Jacobs** **8-11-20 [12]**
10 thru 11
REGER V. ESSEX BANK

The hearing on the Motion for Summary Judgment is continued to 11:00 a.m. on October 15, 2020.

11. 17-22481-E-7 **WILLIAM LANDES** **MOTION TO DISMISS ADVERSARY**
20-2130 **SGO-1 Douglas Jacobs** **PROCEEDING/NOTICE OF REMOVAL**
REGER V. ESSEX BANK **8-17-20 [21]**

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 11:00 a.m. on October 15, 2020.