UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 15, 2020 at 11:00 a.m.

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1. 20-20978-E-7 **JEFFREY ANDERSEN** **AMENDED MOTION TO DISMISS**
20-2111 **RK-1 Jeffery Meisner** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

KELLY V. ANDERSEN ET AL **9-23-20 [88]**

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-Creditor on August 4, 2020. By the court's calculation, 72 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 granted and the Third Cause of Action against Non-Debtor Defendant Bridgette Andersen is dismissed.

Bridgette Andersen, non-filing spouse of Defendant-Debtor Jeffrey Andersen ("Defendant-Spouse"), moves for the court to dismiss all claims against her in Gregory Kelly's ("Plaintiff-Creditor") Complaint according to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction as made applicable by Federal Rule of Bankruptcy Procedure 7012(1).

APPLICABLE LAW

Federal Court Jurisdiction and Exercise of Federal Judicial Power

Subject matter jurisdiction defines a court's power to hear cases. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy" as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
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> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo*,

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

82 F.2d 121, 121–22 (9th Cir. 1936).

Bankruptcy courts are courts created by Congress under Article I of the United States Constitution to administer the federal Bankruptcy Code, found in Title 11 of the United States Code. A bankruptcy court is designated as "a unit of the district court," and, each district court is given the ability to refer all bankruptcy matters to a bankruptcy court. 28 U.S.C. § 151(a) (positioning bankruptcy court within district court); 28 U.S.C. § 157(a) (providing for referral to bankruptcy court). Bankruptcy judges are judicial officers of the district court. 28 U.S.C. § 157(a).

The grant of federal jurisdiction by Congress established in 28 U.S.C. § 1334 is very broad and expansive, including not only matters arising under the Bankruptcy Code and arising in the bankruptcy case, but all other matters "related to" the bankruptcy case, whether federal jurisdiction would otherwise exist for that state law matter to be adjudicated in federal court.

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

. . .

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction–(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Congress provides that the District Court may then assign the bankruptcy cases and all proceedings relating thereto—core and non-core—to the bankruptcy judges in that District.

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(a). The statutory provisions for the Article I bankruptcy judge adjudicating non-core matters is provided for in 28 U.S.C. § 157(c), in which Congress states:

(c) (1) A bankruptcy judge may hear a proceeding that is **not a core proceeding** but that is otherwise related to a case under title 11. In such proceeding, **the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court**, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, **with the consent of all the parties** to the proceeding, may refer a proceeding related to a case under title 11 to a **bankruptcy judge** to **hear and determine and** to **enter appropriate orders and judgments**, subject to review under section 158 of this title [28 USCS § 158, appeals from bankruptcy judge issued orders and judgment].

28 U.S.C. § 157(c) (emphasis added).

The Supreme Court has addressed Congress's creation of federal subject matter jurisdiction

for matters arising under the Bankruptcy Code, in bankruptcy cases, and related to bankruptcy cases over the decades, beginning with *Northern Pipeline* in 1984 through the three recent decisions in *Stern v. Marshall*, 564 U.S. 462, 473–75 (2011), *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 2171–72, 189 L. Ed. 2d 83, 92–93, (2014), and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). These three recent Supreme Court decisions nail down the proper exercise of the federal judicial power between bankruptcy judges and district court judges within the federal jurisdiction provided for in 28 U.S.C. § 1334.

In *Stern v. Marshall*, the Supreme Court addressed the basic grant of federal jurisdiction under 28 U.S.C. § 1334, stating:

> With certain exceptions . . . , the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." § 157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district . . . . District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." § 157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 . . . , bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located. § 152(a)(1).
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> The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." § 157(b)(1). "Core proceedings include, but are not limited to," 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." § 157(b)(2)(c). Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. *See* § 158(a); FED. R. BANKR. P. 8013.
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> When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects.

Stern, 564 U.S. at 473–75.

The Supreme Court followed *Stern* with its 2014 decision in *Executive Benefits Insurance Agency v. Arkison*. In developing the exercise of federal judicial power by a bankruptcy judge for non-core matters, the Supreme Court states:

> The 1984 Act largely restored the bifurcated jurisdictional scheme that existed prior to the 1978 Act. The 1984 Act implements that bifurcated scheme by dividing all matters that may be referred to the bankruptcy court into two

> categories: "core" and "non-core" proceedings. See generally § 157. **It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core.** § 157(b)(3); cf. Fed. Rule Bkrtcy. Proc. 7012. **For core proceedings**, the statute contains a nonexhaustive list of examples, including—as relevant here—"proceedings to determine, avoid, or recover fraudulent conveyances." § 157(b)(2)(H). **The statute authorizes bankruptcy judges to "hear and determine" such claims and "enter appropriate orders and judgments" on them.** § 157(b)(1). A final judgment entered in a core proceeding is appealable to the district court, § 158(a)(1), which reviews the judgment under traditional appellate standards, Rule 8013.
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> **As for "non-core" proceedings—i.e.**, proceedings that are "not . . . core" but are "otherwise related to a case under title 11"**—the statute authorizes a bankruptcy court to "hear [the] proceeding," and then "submit proposed findings of fact and conclusions of law to the district court**." § 157(c)(1). The district court must then review those proposed findings and conclusions de novo and enter any final orders or judgments. *Ibid.* **There is one statutory exception to this rule: If all parties "consent,"** the **statute permits the bankruptcy judge "to hear and determine and to enter appropriate orders and judgments"** as if the proceeding were core. § 157(c)(2).
>
> Put simply: If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. **If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law.** Then, the district court must review the proceeding de novo and enter final judgment.

Exec. Benefits. Ins. Agency v. Arkison, 134 S. Ct. at 2171–72 (emphasis added). The Supreme Court clearly addresses that the core/non-core issue relates to which federal judge issues the final order and judgment, not whether "federal jurisdiction exists."

The Supreme Court rounds out the trilogy of recent cases addressing the proper exercise of federal court judicial power in *Wellness International Network, Ltd. v. Sharif*. In *Wellness International*, the Supreme Court expressly confirms that the Article I bankruptcy judge may properly issue final orders and the judgment on non-core matters with the consent, whether express or implied, of the parties.

STANDARD FOR A MOTION TO DISMISS

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. *Calhoun v. United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979). 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).

Challenges to Subject Matter Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction "must include an inquiry by the court into its own jurisdiction." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980). The court takes all facts alleged in the complaint as true and draws all reasonable inferences in favor of 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).

Federal Rule of Bankruptcy Procedure 7012 also incorporates Federal Rule of Civil Procedure 12(h)(3), which states that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action." FED. R. CIV. P. 12(h)(3) (emphasis added). That consideration may be made at any time by the court, whether by a party's motion or by the court *sua sponte*, even if after final judgment or appeal. *See Kontrick v. Ryan*, 540 U.S. 433, 455 (2004).

A motion to dismiss cannot be granted for lack of subject matter jurisdiction if the complaint purports to set out a federal claim, and that claim must not be insubstantial and frivolous. *Buchler v. United States*, 384 F. Supp. 709 (E.D. Cal. 1974). Relatedly, if the complaint avers jurisdiction generally while allegations in other portions of the complaint negate jurisdiction, then the court should dismiss the action. *Smith v. Gross*, 604 F.2d 639, 641 n.2 (9th Cir. 1979) (citation omitted).

PLAINTIFF-CREDITOR'S OPPOSITION

Plaintiff-Creditor filed an Opposition on August 19, 2020. Dckt. 35. Plaintiff-Creditor argues that the court should deny the Motion to Dismiss on the basis that the court has subject matter jurisdiction over community claims under 11 U.S.C. §§ 101(7), 541(a)(2), & California Family Code § 910(a); that the claim against Defendant-Spouse is permissible; and that Defendant-Debtor's motion to dismiss is untimely and procedurally improper.

Plaintiff-Creditor contends that his claims against Defendant-Spouse are community claims under § 101(7) and community property is brought into the bankruptcy estate of the filing spouse under § 541(a)(2). Furthermore, California Family Code § 910(a) states that "the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." Therefore, the claims in this adversary case should be considered community claims for which this court has jurisdiction.

Plaintiff-Creditor further contends that claims against a non-debtor spouse are permissible because, according to the Ninth Circuit Bankruptcy Appellate Panel, "§ 523(a)(3) provides that a nondischargeability action directed at the non-debtor spouse can be initiated in order to establish an exception to the allowable community claims that are discharged." *In re Kimmel*, 378 B.R. 630 (B.A.P. 9 Cir. 2007).

Plaintiff-Creditor also argues Defendant-Debtor failed to follow procedure provided under Rule 12(b) of the Federal Rules of Civil Procedure, requiring a litigant to file a lack of subject-matter jurisdiction defense before filing a pleading. Because Defendant-Spouse filed an Answer on July 16, 2020, prior to her Motion to Dismiss, the Motion to Dismiss is procedurally defective and should be denied on such basis.

PLAINTIFF'S SUPPLEMENTAL OPPOSITION

On October 9, 2020, Plaintiff-Creditor filed a Supplemental Opposition, and a Memorandum of Points and Authorities in support of the Opposition. Dckt. 114. Plaintiff-Creditor asserts that Defendant-Spouse failed to address certain observations the court made at the September 3, 2020 hearing. Namely, Plaintiff-Creditor contends that Defendant-Spouse's motion offers no new challenges to the adequacy of Plaintiff-Creditor's First Amended Complaint with respect to the claims against her.

Plaintiff-Creditor then proceeds to dispute four alleged facts provided by Defendant-Spouse; although asserting that they are not relevant to challenging the sufficiency of the First Amended Complaint. Moreover, Plaintiff-Creditor contends that the three cases cited by Defendant should not be considered by the court and the Motion should be dismissed because Defendant-Spouse failed to properly discuss the cases in a separate Memorandum of Points as required under Local Rule 9014-1(d)(3)(A). In the Memorandum, Plaintiff-Creditor argues that the cases are distinguishable because the cases presented do not apply California community property laws and Plaintiff-Creditor has pleaded sufficient allegations and facts with documentation to request a determination that Defendant-Spouse not be permitted the hypothetical discharge under 11 U.S.C. §§ 524(a)(3) or 524(b)(2)(A), (B).

Additionally, Plaintiff requests that the Motion be dismissed with prejudice and without leave to amended or further supplementation as Defendant-Spouse has failed to address the elements necessary to have Defendant-Spouse dismissed as a defendant.

Plaintiff-Creditor further requests that pages 2 thru 8 of Defendant-Spouse's declaration be redacted as Plaintiff-Creditor deems her statements "scandalous and irrelevant." Plaintiff-Creditor requests the following be redacted: Defendant-Spouse's emotions about Plaintiff and the alleged efforts to pay; Defendant-Spouse's opinions about alleged harassment from 2016; statements referring to Plaintiff-Creditor as narcissistic and statements referring to Defendant-Spouse's temporary restraining order which was never served and not renewed; Defendant's opinion about reasons Defendant-Debtor was terminated from multiple companies; Defendant-Spouse's "mocking" of Plaintiff's childhood trauma; and Defendant's representation about past settlement discussions.

Moreover, Plaintiff-Creditor requests that Defendant's Counsel be formally sanctioned for his conduct in "personally attack[ing] and mock[ing]" Plaintiff over a traumatic experience from his childhood. Specifically, Plaintiff-Creditor alleges that Defendant's Counsel attempted to "mock" Plaintiff-Creditor on September 25, 2020 in a Meet and Confer call on Discovery.

DEFENDANT'S AMENDED MOTION TO DISMISS

Defendant-Spouse filed an Amended Motion to Dismiss on September 23, 2020. Dckt. 88. Defendant-Debtor argues the court should grant the Motion to Dismiss on the basis that Plaintiff-Creditor can adequately pursue his claim against Defendant-Debtor without naming non-debtor spouse as a party, and, therefore, non-debtor spouse should be dismissed from the adversary matter.

REVIEW OF MOTION

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

A. Defendant-Debtor argues that because fraud has not been shown on the part of the non-debtor spouse and should never be presumed, she should be dismissed from the adversary claim. *La Sueur v. Valley National Bank*, 53 B.R. 414 (1985).

B. A cause of action for declaratory judgment is unnecessary because 11 U.S.C. §§ 524(a) & (b) allow community property to be reachable if injury is proven pursuant to §523 or the discharge is revoked pursuant to § 727.

C. Non-debtor spouse is not a necessary party for the community property to be reached and because she was not involved in any intentional tort caused by her husband, she should be dismissed. *Williams v. Bernardelli*, 12 B.R. 123 (1981). Moreover, Defendant-Spouse did not sign the Confession of Judgment which is the basis of Plaintiff's claim and was not involved in Andersen Enterprises.

D. In *In re Grimm*, non-filing spouse's motion to dismiss was granted because liability for their partner's wrongful acts could not be justifiably imputed to them. *In re Grimm*, 82 B.R. 989 (Bankr. W.D. Wis. 1988).

E. According to the Colliers treatise on Bankruptcy, "when the non-debtor spouse is the innocent party, courts are now generally in agreement that the innocent spouse need not actually be named in a complaint against the debtor to deny discharge or to determine nondischargeable, or if so named, that such a spouse, having received notice of the action, may be dismissed at his or her request." 8 Collier on Bankruptcy P 524.02(3)(b) (16th ed. rev. 2020) (citation references fn. 119 of treatise).

F. Sections 727 (a)(2), (3), & (4) provide that a discharge under § 727 can only discharge the debtor from any debt. Therefore, Defendant-Spouse is unnecessary because Plaintiff-Creditor can only obtain liability against Defendant-Debtor and subjecting the non-debtor spouse is unnecessary and unjustly subjects her to the corresponding obligations of the action as well as psychological distress.

DISCUSSION

At the September 3, 2020 hearing, the court continued the matter after determining that it was appropriate for Defendant-Spouse to provide supplemental pleadings after certain deficiencies were found. Defendant Bridgette was to provide supplemental pleadings addressing what claims were being asserted against her and why such claims should be dismissed.

Preliminary Matters

As a preliminary matter, Plaintiff is correct in that the instant motion was filed after filing her Answer. Rule 12 of the Federal Rules of Civil Procedure, as incorporated as Federal Rules of Bankruptcy Procedure 7012, provides that a motion asserting a defense under lack of subject matter jurisdiction must be made before responsive pleading such as an answer. Fed. R. Bank. P. 7012. However, a review of the Answer shows that Defendant-Spouse filed this Answer *pro se*, using a 1998 answer form no longer operative in this district. Defendant-Spouse engaged counsel after filing the answer.

The court will allow the instant motion to proceed as Defendants filed the Answer *pro se* and likely without knowledge of Rule 12, and much work has already been presented by both parties.

The Hypothetical Discharge

> The court's September 3, 2020 pre-hearing disposition noted the following:
>
> it appears that non-debtor questions the bases for why she has been added to the instant adversary proceeding. Debtor's spouse is not a debtor in this case. The Points and Authorities contains only the generic conclusions "None of the 10 types of proceedings [stated in Fed. R. Bank. P. 7001] involve the determination of whether a nonfiling party or spouse is entitled to received a 'hypothetical discharge.'" Points and Authorities, p. 3:3- 7; Dckt. 28. Defendant makes no efforts to state what is being asserted against her and why such unstated, unarticulated by Defendant claims should be blanket dismissed.
>
> Looking at the Amended Complaint, only the Third Cause of Action is asserted against Defendant, in which Plaintiff states he seeks "To Determine 'Hypothetical' NonDischargeability of Non-Filing Spouse under 11 U.S.C. § 523(c)(1) (Bridgette)." First Amd Cmpt., p. 10:24-25; Dckt. 11. The reference to 11 U.S.C. § 523(c)(1) is merely that provision of the Bankruptcy Code that states that a creditor must affirmatively seek a determination a debt is nondischargeable based on 11 U.S.C. § 523(a)(2), (4), or (6). Relief is requested under several of those sections against the Defendant-Debtor (Defendant's spouse).
>
> The reference of a "hypothetical discharge" is stated in ¶ 81 of the Amended Complaint to be thus afforded under 11 U.S.C. § 524(a)(3), which affords a non-debtor spouse who is liable on the same obligation as the debtor to have all future community property protected by a discharge obtained by the debtor spouse. This continues so long as there is community property.
>
> It could be that Plaintiff is seeking declaratory relief that if a determination of nondischargeability is made as to the Debtor, then even if the Debtor obtains a discharge as to other debts, the community property is not protected if Plaintiff seeks to enforce obligations owed by the non-debtor spouse.
>
> Or, looking at the provisions of 11 U.S.C. § 524(b)(2)(A), (B), the Plaintiff is asserting that the non-debtor spouse, here Defendant, be denied a hypothetical

discharge of the debt, which would make the debt nondischargeable in a future case filed by Defendant.

> (b) Subsection (a)(3) [protection of nondebtor spouse community property interests] of this section does not apply if—
> . . .
> (2)
> (A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
> (B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

Thus, it appears that there is a basis for Defendant to be in this Adversary Proceeding. The court states this without making any determination of the adequacy of the pleadings.

Civil Minutes, pp. 4-5, Dckt. 69.

Clarification In Supplemental Pleadings and Court's Analysis of Hypothetical Discharge for Non-Debtor Spouse

In their supplemental pleadings, the parties direct the court back to the fact that only the Debtor himself is a judgment debtor for the obligation which is the subject of this nondischargeability action. A copy of the Judgment was filed as Exhibit E 003 with the Original Complaint and incorporated into the Amended Complaint. Dckt. 1 at 37-38; Amended Judgment, ¶ 32, FN. 24; Dckt. 11. Thus, the State Court Judgment is part of the pleadings presented by Plaintiff that may be considered as part of the Motion to Dismiss.

The State Court Judgment is clear in that it is awarded to Plaintiff against, and only against, Defendant-Debtor Jeff Andersen. Non-Debtor spouse Bridgette Andersen is not a judgment debtor under the State Court Judgment. Non-Debtor spouse is not a debtor in this bankruptcy case.

Plaintiff has, and desires to continue, enforcement of his State Court Judgment against Jeff Andersen, the Defendant-Debtor in this Adversary Proceeding, against all of Defendant-Debtor's separate property and all community property in which Defendant-Debtor has an interest.

Plaintiff has included a copy of a 2017 assignment of Non-Debtor Defendant Bridgette Andersen's wages. This Assignment is filed as Exhibit G to the Amended Complaint. Dckt. 12 at 7-8. This Order provides for the assignment of Non-Debtor Bridgette Andersen's wages, as community property, to be applied to the judgment obligation of the State Court Judgment debtor Jeff Anderson.

In the Third Cause of Action in the Amended Complaint Plaintiff states that he seeks a

determination that Non-Debtor Bridgette Andersen, who is not seeking a discharge through bankruptcy, is not entitled to the hypothetical discharge as follows:

> 81. Bridgette elected not to file for Bankruptcy, but since she benefited [sic] from Beck's funds in 2012 for personal expenses, and is alleged to be complicit in all Section 727 violations, is not entitled to the "hypothetical" discharge protection afforded by § 524(a)(3).
>
> 82. Bridgette is currently an acknowledged co-debtor in the debt owed to Kelly, and has her income assigned to Kelly through 2025 under California Garnishment laws until the debt is paid in full.

Amended Complaint,¶ ¶ 81, 82. Dckt. 11.

The analysis begins with there being a judgment only against Defendant-Debtor Jeff Andersen. The State Court Judgment awards the monetary relief only against the Defendant-Debtor. Non-Debtor Defendant Bridgette Andersen is not personal liable under the State Court Judgment.

In the First Amended Complaint Plaintiff states that the Non-Debtor Defendant "is currently an acknowledged co-debtor in the debt owned to Kelly, and has her income assigned to Kelly through 2025 under California Garnishment laws until the debt is paid in full." However, the "Assignment of Community Spouses Wages" is not a judgment or order imposing a monetary obligation, but determines that Non-Debtor Defendant Bridgette Andersen's wages are community property and that such community property is "assigned" to be applied to the Defendant-Debtor's obligation under the State Court Judgment - a judgment for which Non-Debtor Defendant Bridgette Andersen has no personal liability.

The California legal principles of community property, the liability of community property to pay the debt of one spouse, and the rights of a non-debtor spouse are often confused by even the most experienced of attorneys and judges. Beginning with California Family Code § 760, community property is defined as follows:

> § 760. Community property
>
> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

So, all property acquired during the marriage is community property. Defendant-Debtor and Non-Debtor Defendant Bridgette Anderson are married. California law continues, providing that community property is liable (not a non-judgment debtor spouse) for debts of either spouse.

> § 910. Community estate liable for debt of either spouse
>
> (a) Except as otherwise expressly provided by statute, **the community estate is liable for a debt incurred by either spouse before or during marriage**, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment

for the debt.

(b) "During marriage" for purposes of this section does not include the period after the date of separation, as defined in Section 70, and before a judgment of dissolution of marriage or legal separation of the parties.

Cal. Fam. Code § 910 (emphasis added); *United States v. Berger*, 574 F.3d 1202, 1205 (9th Cir. 2009). Even though the non-judgement debtor spouse is not personally liable, all of the community property is "liable" and can be reached to satisfy the debts of either spouse.

California Code of Civil Procedure § 695.020 addresses the enforcement of a judgment against community property. It ties in the above Family Code section. It further states that all of the provisions that would apply to a judgment debtor with respect to an enforcement of a judgment against community property will also apply to the non-judgment debtor spouse of the judgment debtor.

California Law provides for an assignment order in the enforcement of a judgment in California Code of Civil Procedure § 708.510 for the following (emphasis added):

§ 708.510. Order to assign right to payment

(a) Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor or to a receiver appointed pursuant to Article 7 (commencing with Section 708.610) all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including but not limited to the following types of payments:

(1) Wages due from the federal government that are not subject to withholding under an earnings withholding order.

(2) Rents.

(3) Commissions.

(4) Royalties.

(5) Payments due from a patent or copyright.

(6) Insurance policy loan value.

The Assignment Order, Exhibit G, only states that the wages are community property and an "assignment on Bridgette A. Andersen's wages" is allowed. The "wages" are not identified, though as provided in California Code of Civil Procedure, the assignment is allowed only for wages due from the federal government. Earning withholding orders, which are used to garnish a person's wages, such as community property wages, is provided for in California Code of Civil Procedure §§ 706.010 et seq.

While Plaintiff asserts that Non-Debtor Defendant Bridgette Anderson is a "co-debtor" on the debt of Defendant-Debtor, the allegations in the Amended Complaint and Exhibits show otherwise. It is

the community property that is liable and there is an assignment order for non-specific "wages" that are ordered assigned. To the extent that Non-Debtor Defendant Bridgette Anderson were to not comply with an order of the California Superior Court, then she will answer to that court. However, that does not make her a co-debtor on the State Court Judgment.

It is further alleged that Non-Debtor Defendant Bridgette Anderson is complicit in the alleged conduct that violates the provisions of 11 U.S.C. § 727 by which a debtor would be denied a discharge. This is included in the exception grounds of 11 U.S.C. § 524(b) to the application of the community property stay arising from a discharge obtained by only one spouse.

Breaking down 11 U.S.C. § 524(a)(3), it provides:

1. The discharge obtained by one spouse operates as an injunction;

2. Against acts to collect, recover from, or enforce a pre-bankruptcy judgment;

3. Against community property acquired after the commencement of the bankruptcy case;

4. Except a community claim that is excepted from discharge under various sections of the Bankruptcy Code, including 11 U.S.C. § 523 as to the debtor spouse; or

5. Would be so determined nondischageable by the debtor's non-debtor's spouse if the non-debtor spouse were to have filed a bankruptcy case at the same time as the debtor spouse filed a case.

On this last point, for a debt to be determined nondischargeable, it requires that there first be a debt owed by the non-debtor spouse for the nondischargeable debt of the debtor spouse. Here, there is no claim stated that Non-Debtor Defendant Bridgette Anderson is personal liable on the State Court Judgment. To the contrary, the State Court Judgement is expressly against only Defendant-Debtor Jeff Andersen. With respect to the Assignment Order, any liability thereon for the Non-Debtor Defendant Briddgette Anderson is her obligation, separate and apart from the Defendant-Debtor's obligation on the State Court Judgment.

This is discussed in 4 Collier on Bankruptcy ¶ 524.02[3] and the application of the hypothetical discharge arising when the non-debtor spouse is personally liable on the same debt as the debtor spouse:

> [3] The Effect of the Discharge on Community Property; §§ 524(a)(3) and 524(b)
>
> Sections 524(a)(3) and 524(b) address (1) the **situations** in which **one spouse has received a discharge** and the **other spouse is liable on an otherwise dischargeable community claim** but **has not filed a bankruptcy petition**, and (2) the situations in which both spouses have filed bankruptcy petitions, but one spouse has been denied a discharge or had one or more obligations found nondischargeable.

> By sections 524(a)(3) and 524(b),the Code grants fresh-start protection against dischargeable claims for after-acquired community property when both spouses are innocent of any wrongdoing, even if one spouse chooses not to file a bankruptcy case. However, by these same provisions, the Code also prevents a wrongdoer from hiding behind the other spouse's discharge. Under those circumstances, a discharge as to after-acquired community property is denied, and the property remains liable for the debts of the nondischarged spouse. However, this also has the effect of frustrating the innocent spouse's fresh start.

DECISION

The court determines that the Motion to Dismiss the Third Cause of Action is proper. Here, there is no "short and plain statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008. These basic pleading requirements have been addressed by the Supreme Court in several recent 21st Century decisions. First in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007), the Supreme Court states:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc*., 40 F.3d 247, 251 (CA7 1994), 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 the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A*., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

The second decision of the Supreme Court on this point is *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009), which states:

> As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id*., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). A pleading that offers "labels and conclusions" or "a

> formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929.
>
> 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." *Id.*, at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted).

This federal courts have been granted jurisdiction by Congress to adjudicate matters arising under the Bankruptcy Code, in the bankruptcy case and related to the bankruptcy case. 28 U.S.C. § 1334(a). The United District Court for the Eastern District of California has referred all bankruptcy cases and related matters to the bankruptcy judges in this District. E.D. Cal. Gen. Orders 182, 223. Determination of nondischargeability pursuant to 11 U.S.C. § 523 and § 727, and the scope of the discharge injunction arising under 11 U.S.C. § 524(a) and (b) are core matter proceedings arising under the Bankruptcy Code for which the bankruptcy judge issues all final orders and judgment.

The Motion is granted and the Third Cause of Action against Non-Debtor Defendant Bridgette Andersen is dismissed. If Plaintiff desires to amend his Complaint to state further claims for relief, such may be done only with leave of the court. Fed. R. Civ. P. 15(a)(1), (a)(2), and Fed. R. Bank. P. 7015. [FN.1.]

FN.1. Plaintiff-Creditor requests the court strike 7 out the 8 pages of declaration provided by the Defendant-Spouse. In light of the ruling above concluding that the First Amended Complaint fails to state a claim or controversy between Plaintiff and Non-Debtor Defendant Bridgette Andersen, the court does not issue a ruling on that academic question. The court has not considered the Declaration in ruling on the Motion based on the face of the pleadings.

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 Bridgette Andersen ("Non-Debtor Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the Third Cause of Action in the First Amended Complaint against Bridgette Andersen is dismissed.

IT IS FURTHER ORDERED that Plaintiff Gregory Kelly having already amended his complaint, Plaintiff must obtain leave of the court to further amend the First Amended Complaint if he seeks to state further claims for relief. Fed. R. Civ. P. 15(a)(1), (a)(2), and Fed. R. Bank. P. 7015. If a motion for leave to file a further amended complaint is filed by Plaintiff, a copy of the proposed further amended complaint shall be filed as an exhibit in support of any such motion.

2. **20-21481-E-7** **CAROL PAYNE** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
20-2119 **RLC-2 Gary Fraley**
CHERI ROBINSON AS TRUSTEE FOR ARTHUR AND AMRITA RO V. PAYNE
8-21-20 [11]

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 Defendant-Debtor, Defendant-Debtor's Attorney and Office of the United States Trustee on August 24, 2020. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment 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 non-responding parties 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 ~~hearing on the~~ Motion for Entry of Default Judgment is xxxxxxx.

Cheri Robinson, as Trustee for the Arthur and Amrita Robinson Family Trust, and Arthur and Amrita Robinson Family Trust (collectively "Plaintiffs") filed the instant Motion for Default Judgment on August 21, 2020. Dckt. 11. Plaintiff seeks a default judgment against Carol Lydia Payne ("Defendant-Debtor") in the instant Adversary Proceeding No. 20-02119.

The instant Adversary Proceeding was commenced on June 17, 2020. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on June 18, 2020. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on July 21, 2020. Dckt. 8.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint to determine dischargeability of debt under 11 U.S.C.§ 523(a)(4). The Complaint contains the following general allegations as summarized by the court:

A. Defendant-Debtor filed a Chapter 7 bankruptcy case on March 12, 2020.

B. Defendant-Debtor failed to list Plaintiff as a creditor and failed to disclose the litigation pending in the Superior Court for the County of Contra Costa, Case No. P19-01625 ("State Court Action").

C. On November 19, 2019, the State Court Judge entered an Order a) removing Defendant-Debtor as Trustee of The Arthur and Amrita Robinson Family Trust ("The Trust"); b) appointing Cheri Robinson as Trustee of the Trust; and c) requiring Defendant-Debtor to file a report and account for her acts during her tenure as trustee within 30 days of November 1, 2019 and ordering her not to use Trust funds for her defense.

D. State Court Judge entered Order in favor of Plaintiffs on January 21, 2020, and amended on January 30, 2020, a) removing Defendant-Debtor as Trustee of The Arthur and Amrita Robinson Family Trust; b) appointing Cheri Robinson as Trustee of the Trust; and c) ordering Defendant-Debtor turn over all trust assets to successor trustee including real property known as 4405 Feather River Blvd., Olivehurst, California within five days of January 21, 2020. Defendant-Debtor has failed to comply with the court's order.

E. Additionally, the January 21, 2020 Amended Order required Defendant-Debtor to pay double damages for the value misappropriated; not use Trust funds for her defense and to be surcharged to the extent that she used trust funds for her defense, and awarded Plaintiff attorney fees and costs.

F. Arthur and Amrita Robinson ("Settlors") established the Robinson Family 1994 Revocable Living Trust on June 26, 1994.

G. The Trust was revised and entirely replaced on August 5, 2005. The Trust was created for Settlors' benefit and for the benefit of their son, Steven Robinson and his children. At that time, the Trust named Mechanics Bank Trust Department as successor trustee following the death of surviving settlor.

H. The Trust was amended and restated on August 4, 2014 naming Lenora Robertson, Settlors' friend, as successor Trustee and Carol Payne, Settlors' friend, as alternative successor Trustee.

I. Settlor Arthur Robinson passed away on February 10, 2015 and Settlor

Amrita Robinson passed away on March 1, 2016. Settlor Amrita Robinson's cash assets of approximately $80,000 have disappeared. Plaintiff does not know the exact amount of the cash received by Defendant-Debtor.

J. On March 31, 2016, Trustee Lenora Robertson resigned, and Defendant-Debtor became the trustee.

K Defendant-Debtor sold real property of the Trust on June 2016 without giving Notice of the Proposed Action to the Plaintiff and other beneficiaries and while they were on vacation abroad. Defendant-Debtor obtained at least $279,101.72 from this sale.

L. Defendant-Debtor also obtained at least $203,075.77 in life insurance proceeds from a Jackson National Life Insurance policy on January 13, 2017. Defendant-Debtor also obtained at least $27,871.66 in life insurance proceeds from a Midland National Life Insurance on May 31, 2017.

M. After reviewing the Trust's Bank of America account, Plaintiff believes that Defendant's Debtor spent $635,99.82 between March 2, 2018 and August 5, 2019: $234,288.01 spent on trust purposes and $401,702.81 spent by Defendant-Debtor in non-trust purposes. No inventory of trust assets has been provided by Defendant-Debtor.

N. To date, Defendant-Debtor has failed to provide a proper accounting to Plaintiff and the beneficiaries. Defendant-Debtor provided an "accounting" on June 4, 2020, attached as Exhibit A of the Complaint. (The court notes that Exhibit A is a series of handwritten notes with amounts and one to three word descriptions, some of them upside-down, a two-page dental surgery itemization and payment plan form, and two void checks, #2088 and #2085.)

O. Defendant-Debtor has failed to perform her duties in a reasonable and prudent manner, breached her fiduciary duties and breached the trust. Defendant has engaged in self-dealing. Defendant violated her duty of loyalty and used Trust for her benefit and to the detriment of the beneficiaries. Moreover, Defendant-Debtor commingled Trust assets with her personal assets.

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

A. A determination of the amount of damages owed by Defendant-Debtor to Plaintiff as the result of her fraud/defalcation/embezzlement; and

B. A determination that the damages suffered by the Robinson Family Trust are nondischargeable.

RELIEF SOUGHT IN MOTION FOR DEFAULT JUDGMENT

Plaintiffs filed the Motion for Default Judgment, accompanied by, the Declaration of Cheri Robinson, Dckt. 13.

In the Motion, Plaintiff requests the following relief:

1. A determination that the amount owed by Defendant-Debtor to Plaintiffs is $902,000.

2. That the amount owing is not discharged in Defendant-Debtor's bankruptcy case.

REVIEW OF THE MOTION FOR ENTRY OF DEFAULT JUDGMENT

On August 21, 2020, Plaintiffs filed the instant Motion for Entry of Default Judgment pursuant to Fed. R. Bankr. P. 7055. Dckt. 11. Plaintiff asserts that the evidence offered in support of this Motion supports the well-pleaded factual allegations in the Complaint.

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

1. On June 17, 2020 Plaintiffs filed the instant adversary proceeding alleging that Defendant breached her duties to Plaintiffs and that discharge should be denied pursuant to 11 U.S.C. § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

2. Defendant-Debtor failed to list Plaintiff as a creditor and failed to disclose the litigation pending in the Superior Court for the County of Contra Costa.

3. State Court Judge entered Amended Order in favor of Plaintiffs on January 30, 2020 removing Defendant-Debtor as Trustee of The Arthur and Amrita Robinson Family Trust and ordering Defendant-Debtor turn over all trust assets including real property. Defendant-Debtor has failed to comply with the court's order.

4. The Amended Order required Defendant-Debtor to pay double damages for the value misappropriated; not use Trust funds for her defense and awarded Plaintiff attorney fees and costs.

5. Plaintiff filed Proof of Claim 2 on July 3, 2020 in the amount of $902,000, an estimate of the amount embezzled by Defendant-Debtor plus attorney fees.

6. Arthur and Amrita Robinson ("Settlors") established the Robinson

Family 1994 Revocable Living Trust on June 26, 1994.

7. The Trust was revised and entirely replaced on August 5, 2005. At that time, the Trust named Mechanics Bank Trust Department as successor trustee following the death of surviving settlor.

8. The Trust was amended and restated on August 4, 2014 naming Lenora Robertson, Settlors' friend, as successor Trustee and Carol Payne, Settlors' friend, as alternative successor Trustee.

9. Settlor Arthur Robinson passed away on February 10, 2015 and Settlor Amrita Robinson passed away on March 1, 2016. Settlor Amrita Robinson's cash assets of approximately $80,000 have disappeared. Plaintiff does not know the exact amount of the cash received by Defendant-Debtor.

Motion, Dckt. 11. The above is the entirety of what is stated in the Motion. No exhibits are provided in support of the Motion.

ADDITIONAL DOCUMENTS FILED WITH THE MOTION

Next, the Declaration of Cheri Robinson, one of the Plaintiffs in this adversary proceeding was filed. Dckt. 13. Plaintiff Cheri Robinson's Declaration seems to be a word for word copy/paste of the motion. The only statement added to this declaration not found in the motion is the following statement of funds spent by Defendant-Debtor as it pertained to the bank statement for the Trust:

> Between April 14, 2016 and August 5, 2019 $635,90.82 was expended from that account. Of those expenses I believe that $234,288.01 were likely expended on trust purposes. The leaves $401,702.81 spent by Defendant on a variety of purposes. There were frequent cash withdrawals and checks payable to cash, veterinary bills, house payments for Defendant's residence, car repairs, in all hundreds of payments that did not benefit the Trust or the beneficiary of the Trust. I also believe that attorney fees that the Trust has incurred now exceed $50,000. Judge Sugiyana's January 21, 2020 order awarded double damages to the Trust. The Proof of Claim that I filed in Defendant's bankruptcy case reflects the doubling required by Judge Sugiyana. I suspect that Defendant misappropriated more money from the Trust but without an accounting[.]

Id. at ¶ 7.

Moreover, Plaintiff Robinson states in her declaration that the January 21, 2020 Order as Amended is filed as an Exhibit in support of the present motion, yet no exhibits were filed in support. Indeed the January 21, 2020 Order as Amended has not been filed as an exhibit in this adversary proceeding.

This "evidence" provides little factual testimony by the Declarant, but just factual conclusions that the Declarant dictates to the court. The Declarant makes reference to other documents, and tells the court what she hears them say when she reads them, but the documents are not provided to

the court as evidence in support of the Motion. There is testimony as to orders of a Superior Court judge, but the court is provided only what the Declarant hears them say.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

Debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny pursuant to 11 U.S.C. § 523(a)(4)

In section 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny." Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

"Defalcation" for purposes of this exception to discharge refers to a failure to produce funds entrusted to a fiduciary. On this point, the case law has always been uniform. However, prior to 2013, the courts were divided regarding the required scienter for application of the discharge exception. The

Supreme Court settled the issue in 2013, in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 133 S. Ct. 1754 (2013), holding that defalcation under section 523(a)(4) requires "a culpable state of mind" with a "knowledge of, or gross recklessness in respect to the improper nature of the relevant fiduciary behavior." *Bullock*, 569 U.S. at 269. The Court emphasized that even if the debtor's conduct does not involve bad faith or immoral conduct, the conduct giving rise to the debt must be intentional conduct. For purposes of defalcation under section 523(a)(4), the Court included within the scope of intentional conduct "not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id.* at 273. That equivalency to actual knowledge exists if the debtor-fiduciary "consciously disregards" or is willfully blind to "a substantial and unjustifiable risk" that his conduct will breach a fiduciary duty. *Id.* at 274 (quoting ALI, Model Penal Code § 2.02(2)(c) (1985)).

The required elements of embezzlement are: (1) appropriation of funds for the debtor's own benefit by fraudulent intent or deceit; (2) the deposit of the resulting funds in an account accessible only to the debtor; and (3) the disbursal or use of those funds without explanation of reason or purpose. *In re Bryant*, 28 C.B.C.2d 184, 147 B.R. 507 (Bankr. W.D. Mo. 1992). For purposes of section 523(a)(4) it is improper to automatically assume embezzlement has occurred merely because property is missing, since it could be missing simply because of noncompliance with contractual terms. *In re Hofmann*, 27 C.B.C.2d 1291, 144 B.R. 459 (Bankr. D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993); *see also In re Rose*, 934 F.2d 901 (7th Cir. 1991).

Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker's use without the consent of the owner. As distinguished from embezzlement, the original taking of the property must be unlawful. For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a "felonious taking of another's personal property with intent to convert it or deprive the owner of same." *In re Smith*, 253 F.3d 703 (5th Cir. 2001) (not for publication); *In re Rose*, 934 F.2d 901 (7th Cir. 1991).

In short, section 523(a)(4) excepts from discharge debts resulting from the fraudulent appropriation of another's property, whether the appropriation was unlawful at the outset, and therefore a larceny, or whether the appropriation took place unlawfully after the property was entrusted to the debtor's care, and therefore was an embezzlement. 4 Collier on Bankruptcy P 523.10 (16th 2019).

DISCUSSION

Plaintiff filed this Motion for Entry of Default Judgement on August 21, 2020. Defendant has not provided opposition. Unfortunately for Plaintiff, the motion has been filed bare with no supporting evidence. Plaintiff refers to a State Court Amended Order, Bank of America bank statements, and a Proof of Claim. In making a reference to the proof of claim, the court could infer this to be a request that said proof of claim be considered as evidence never filed as an exhibit in support of the motion. This is still unhelpful to Plaintiff.

It remains that there has not been evidence in support of the allegations in the complaint. Even if the court were to determine the proof of claim as evidence, the proof of claim filed in Defendant-Debtor's bankruptcy case, only includes a Notice of Pendency Action filed with the Clerk of the Contra Costa Superior Court. The statement refers to Defendant-Debtor's suspension as trustee to the Trust, appointment of Plaintiff as temporary trustee; ordering Defendant-Debtor to provide an accounting and

turn over trust property assets and instructing Defendant-Debtor not to use trust funds for her defense. The court notes that there is no order or judgment with findings of fact and conclusions of law in state court as to the amounts owed and the basis of liability.

At this juncture, it appears that Plaintiff has two options: 1) to continue the hearing and file an amended motion with supporting evidence and a separate hearing, or 2) have this motion denied with prejudice and file a new motion starting with a clean slate.

At the hearing, **xxxxxxx**

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 Entry of Default Judgment filed by Cheri Robinson, as Trustee for the Arthur and Amrita Robinson Family Trust, and Arthur and Amrita Robinson Family Trust (collectively "Plaintiffs") 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 ~~hearing on the~~ Motion For Entry of Default Judgment **xxxxxxxx**

FINAL RULINGS

3. **19-25936-E-7** **NUR BANO** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
20-2152 **Gary Fraley**
CARELLO V. NISHA **9-29-20 [10]**

Final Ruling: No appearance at the October 15, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Plaintiff-Trustee as stated on the Certificate of Service on September 30, 2020. The court computes that 15 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 September 29, 2020.

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

4. **20-20992-E-7** **SARA/CHARLES GRESHAM** **ORDER TO SHOW CAUSE - FAILURE**
20-2108 **Pro Se** **TO PAY FEES**
LARKINS V. GRESHAM ET AL **9-15-20 [26]**

Final Ruling: No appearance at the October 15, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Plaintiff and Defendant-Debtor as stated on the Certificate of Service on September 17, 2020. The court computes that 28 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: $88.00 due on September 10, 2020.

The Order to Show Cause is discharged; and the Matter is removed from the Calendar, the court having granted the requested waiver for payment of the filing fee.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $88.00.

On September 28, 2020, the Bankruptcy Court Sacramento Division sent Plaintiff Amanda Larkins a Notice notifying Plaintiff that her personal check #553 in the amount of $88.000 was returned as the court accept personal checks. Dckt. 29. On October 5, 2020, the Bankruptcy Court Sacramento Division sent Plaintiff Amanda Larkins a Notice notifying Plaintiff that her personal check #556 in the amount of $88.000 was returned as the court accept personal checks. Dckt. 30.

However, the court has subsequently been provided additional evidence in conjunction with a Status Conference and a Settlement of this Adversary Proceeding stated on the record and embodied in an order entered by the court.

The court has vacated the order denying the Application for a Fee Waiver and entered an Order granting the Application and waiving the filing fee for Plaintiff 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 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, the court having entered an order waiving the payment of the filing fee by Plaintiff in this Adversary Proceeding.

5. **17-22481-E-7** **WILLIAM LANDES** **CONTINUED MOTION FOR SUMMARY JUDGMENT**
20-2130 **MPD-1 Douglas Jacobs**
REGER V. ESSEX BANK **8-11-20 [12]**
5 thru 6

Final Ruling: No appearance at the October 15, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion— No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Trustee, Defendant-Creditor, and Office of the United States Trustee on August 11, 2020. By the court's calculation, 35 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 for Summary Judgment is further continued to 11:00 a.m. on October 29, 2020, due to the court's determination of further judicial review and consideration being required.

6. **17-22481-E-7** **WILLIAM LANDES** **CONTINUED MOTION TO DISMISS**
20-2130 **SGO-1 Douglas Jacobs** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

REGER V. ESSEX BANK **8-17-20 [21]**

Final Ruling: No appearance at the October 15, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion— No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Trustee, Defendant-Creditor, and Office of the United States Trustee on August 17, 2020. By the court's calculation, 38 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 further continued to 11:00 a.m. on October 29, 2020, due to the court's determination of further judicial review and consideration being required.

7. **20-20978-E-7** **JEFFREY ANDERSEN** **MOTION TO COMPEL PRODUCTION**
20-2111 **GK-16** **OF DOCUMENTS, SET ONE**
KELLY V. ANDERSEN ET AL **10-5-20 [97]**

Final Ruling: No appearance at the October 15, 2020 hearing is required.

Local Rule 9014-1(f)(2) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor's Attorney on October 1, 2020. By the court's calculation, 15 days' notice was provided. The court required no less than 10 days' notice. *See* Dckt. 33.

The Motion to Compel Production of Documents, Set One was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Defendant-Debtor were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Motion to Compel Production of Documents is continued to 11:00 on October 29, 2020.