UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

October 16, 2017 at 10:00 a.m.

1.	16-20912-A-11 PCB-5	SEAN SUH'S CARE HOMES, INC.	MOTION FOR FINAL DECREE AND ORDER CLOSING CASE 9-8-17 [157]

Final Ruling: The motion will be dismissed without prejudice because it was not properly served. First, the motion was not served on all creditors. For instance, Comcast and SMUD, although listed on the list of 20 largest unsecured claims (Docket 6), are not on the proof of service for the motion. Docket 160.

Further, service on creditors Alejandro DeLa Cruz and First Citizens Bank is defective. Fed. R. Bankr. P. 9013 and 9014(a) provide that a request for an order shall be made by a motion. Fed. R. Bankr. P. 9014(b) further provides that a motion must be served in the manner provided for service of a summons and a complaint. Fed. R. Bankr. P. 7004(b) permits service of a summons and a complaint by first class mail. But, nothing in Fed. R. Bankr. P. 7004 permits service on the respondent's attorney to the exclusion of the respondent. Alejandro DeLa Cruz and First Citizens Bank were not served with the motion, only their counsel were served. Accordingly, their service is defective.

The debtor should also note that service on First Citizens Bank may require compliance with Fed. R. Bankr. P. 7004(h).

Finally, the IRS was not served in accordance with the guidelines in the court's roster of government agencies, located at this web address: http://www.caeb.uscourts.gov/documents/Forms/EDC/EDC.002-785.pdf. Although this motion is not an adversary proceeding, it is a contested matter. The IRS was served only at its Philadelphia address. It was not served at its Washington D.C. and Sacramento addresses.

2.	17-21035-A-7 17-2083 KOOSHKEBAGHI V. SIMONS ET AL	MICHAEL/STACEY SIMONS RK-2	MOTION TO DISMISS OR IN THE ALTERNATIVE TO STRIKE 9-6-17 [30]

Tentative Ruling: The motion will be denied.

The defendants, Michael and Stacey Simons, seek dismissal of the first amended complaint filed on August 6, 2017 by the plaintiff Afshin Kooshkebaghi.

The complaint alleges that the defendants purchased a 2005 Ford F350 truck in August 2015 from the plaintiff for $21,000. The defendants paid $15,000 toward the purchase price, with the agreement that the additional $6,000 would be paid within reasonable time. In September 2015, the California Department of Motor Vehicles issued a certificate of title to defendant Michael Simons, referencing

the plaintiff as a lien holder.

After the defendants did not pay the additional $6,000, the plaintiff filed a state court action against them in August 2016. On November 8, 2016, the state court entered a judgment after trial against defendant Michael Simons for $6,185.

In December 2016, the plaintiff sought to enforce the judgment against Michael Simons' bank account at U.S. Bank but was unsuccessful because the account had been closed.

The defendants filed the underlying chapter 7 case on February 20, 2017. The plaintiff is listed as a creditor on Schedule E/F. The defendants' statement of financial affairs indicates the plaintiff received $6,210 from their bank account pursuant to a judgment levy. The statement of financial affairs also states that in December 2016, the defendants sold the vehicle to Carmax for $8,000.

During the defendants' meeting of creditors in April 2017, the plaintiff questioned defendant Michael Simons to determine how he was able to sell the vehicle without paying the plaintiff's lien. Mr. Simons stated that the lien had been released by the California DMV prior to the sale pursuant to his request. The plaintiff requested the documents presented to DMV for the release of the lien, but the defendants have not produced them.

The defendants stated that they spent the $8,000 from the sale of the vehicle on rent, utilities, and telephones. The trustee requested supporting documentation for those claims, but the defendants have not provided such documentation.

The defendants were unable to explain why the statement of financial affairs does not list payments larger than $600 within 90 days of the petition date.

The defendants further testified at the creditors' meeting that they disputed the plaintiff's debt, even though the debt had not been scheduled as disputed. They also testified that the plaintiff had not levied upon the $6,210 referenced in the statement of financial affairs.

The trustee filed a report of no distribution on May 1, 2017. The plaintiff filed this adversary proceeding on May 22, the last day to file complaints pursuant to 11 U.S.C. §§ 523 and 727. The first amended complaint was filed on August 6, 2017, after the court dismissed in part the plaintiff's original complaint. Dockets 20 & 23.

In the amended complaint, the plaintiff objects to the defendants' discharge under section 727(a)(4)(A); asserts that his claim is made nondischargeable by 11 U.S.C. § 523(a)(6); and seeks damages in the amount of $6,185, as well as attorney's fees and costs.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint

in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*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.' . . . 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. . . . 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. . . . 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."'*"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

The Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"*First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for

summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

Preliminarily, even though the court granted in part the defendants' prior motion to dismiss the original complaint, the defendants have not yet lodged an order on that motion.

The defendants shall lodge an order on the prior dismissal motion before the hearing on this motion.

The motion will be denied.

First, as already stated in the court's ruling on the prior motion to dismiss, the court will not transform a motion to dismiss into one for summary judgment. See Docket 20. The motion contests the veracity and weight of the facts alleged in the complaint. That is not the standard of a Rule 12(b)(6) motion. The court is required to accept all well pleaded factual allegations in the complaint as true. The court will not consider facts outside the four corners of the complaint. The supporting declaration is not probative to the resolution of this motion for the same reasons.

Second, the motion makes no effort to brief the law on the asserted claims under sections 727(a)(4)(A) and 523(a)(6), even though it asserts failure to state a claim under Rule 12(b)(6).

Third, under section 727(a)(4)(A), the plaintiff must prove that "the debtor knowingly and fraudulently, in or in connection with the case - (A) made a false oath or account." The complaint clearly alleges that certain representations in the schedules and statement of financial affairs, signed by the defendants under the penalty of perjury, were later contradicted under oath by the defendants at the meeting of creditors.

For example, the reference in the statement of financial affairs to the levy on the bank account was denied by the defendants at the creditors' meeting. From this, the court can draw a reasonable inference that the defendants knowingly made a false oath when they signed their statement of financial affairs. Hence, the alleged facts establish facial plausibility for liability under section 727(a)(4)(A).

Fourth, 11 U.S.C. § 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."

To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id.

Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The debtor must have had the subjective intent to harm or the subjective belief / knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6).

A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

"Within the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." Sicroff at 1106.

According to the complaint, the defendants testified that it was them who submitted documents to the California Department of Motor Vehicles to have the plaintiff's lien on the subject vehicle released, prior to the sale of the vehicle. The plaintiff claims that he did not permit the release of his lien.

According to the complaint, the act of submitting the documents to DMV for the release of the lien was done intentionally.

Also, when the defendants caused the release of the plaintiff's lien with the DMV and then sold the vehicle, it is plausibly inferred from the complaint that they were acting with the intent or knowledge that the plaintiff be deprived of his collateral thereby causing him financial harm.

Accordingly, the alleged facts establish facial plausibility for liability under section 523(a)(6).

The allegations in the amended complaint are sufficient to state a claim upon which relief can be granted under section 727(a)(4)(A) and section 523(a)(6).

Finally, the lack of a proper signature on the amended complaint can be remedied easily. The court will not dismiss a complaint simply on the basis that it was not signed, but it will be signed. The plaintiff shall file a properly signed amended complaint within seven days of the hearing on this motion. This signed amended complaint shall be identical to the one filed on August 6, 2017.

3. 17-21035-A-7 MICHAEL/STACEY SIMONS STATUS CONFERENCE
17-2083 8-6-17 [23]
KOOSHKEBAGHI V. SIMONS ET AL

Tentative Ruling: None.

4. 10-36150-A-11 KARIN FRANK MOTION TO
16-2005 KYL-3 COMPEL
FRANK V. CHASE HOME FIN., L.L.C., ET AL., 9-18-17 [104]

Final Ruling: The motion has been voluntarily dismissed. Docket 108.

5. 87-20156-A-7 DALE/ANNA ATKINS OBJECTION TO
87-2153 BRK-4 EXEMPTIONS
FIBERGLASS REPRESENTATIVES ET AL., V. 9-7-17 [140]
ATKINS

Tentative Ruling: The objection will be overruled.

The court entered an order on May 2, 2017 (Docket 104), granting creditor James Barrett's motion for reconsideration of an order denying his request to sell a real property owned by Dale Atkins, one of the debtors in the underlying chapter 7 case, in order to satisfy a judgment Mr. Barrett holds against Dale Atkins's deceased wife, Anna Atkins. Docket 96.

In granting the reconsideration motion, this court ruled that:

"*Accordingly, when Anna Atkins passed away in August 2013, they were still married and held title to the property as joint tenants, with their interest in the property being community property. But, even if their respective interests were separate property, as noted above, Kircher v. Kircher, 189 Cal. App. 4th at 1114-16 interpreted sections 13550 and 13551 as allowing a deceased spouse's creditor to enforce its claim against property previously held in joint tenancy by the spouses.*

"*Thus, Mr. Barrett may recover against one-half of the subject property, to the extent the property 'is not exempt from enforcement of a money judgment' and ['][it] is not administered in the estate of the deceased spouse.' Cal. Prob. Code § 13551(a). In addition, the recovery must take into account any encumbrances against the property and must be limited to 'the fair market value [of the property] at the date of the decedent's death.' Cal. Prob. Code § 13551.*

"*The court is aware only of a $75,000 exemption against the property. This information comes from Mr. Barrett. Docket 47 at 5.*

"*The property was not administered in the probate estate of Anna Atkins. Docket 53 at 11.*

"*There are $66,643 in encumbrances against the property. This information comes from Mr. Barrett. Docket 47 at 5. The opposition to the request for sale says nothing about the encumbrances against the property. See Docket 52.*

"*The court will authorize Mr. Barrett to sell the property to enforce this court's judgment. His recovery will be limited to one-half of the real property's fair marker value as of the day, in August 2013, when Anna Atkins*

passed away, minus the exemption and encumbrances against the property. Within 14 days of closure of the property's sale, Mr. Barrett shall file a report with the court, accounting for the sales proceeds."

Docket 96 at 12-13; see also Docket 104 (order granting reconsideration motion).

Mr. Barrett now "objects" to Dale Atkins' exemption against the property, arguing that "*[a]fter deducting the BARRETT recovery as described above, the amount left for Dale Atkins is not less than the sum of* ***$299,196.50****, which amount is greater than any amount Dale Atkins could legally claim as a homestead exemption.*"

The objection, despite being denominated an objection to an exemption, does not challenge the merits of Dale Atkins' $75,000 exemption. Mr. Barrett in fact agrees that Dale Atkins is entitled to the $75,000 exemption. Docket 140 at 2.

Rather, this is an objection to the sale order even though the court entered the sale order requested by Mr. Barrett. Now, Mr. Barrett wishes a third bite of the apple and hopes to snag more of the sale proceeds from the sale of the property even though the sale order gives Mr. Barrett exactly what he asked for in the reconsideration motion.

The court does not agree with and sees no basis for Mr. Barrett's "objection."

First, the court allowed Mr. Barrett to recover only "*one-half of the real property's fair marker [sic] value as of the day, in August 2013, when Anna Atkins passed away, minus the exemption and encumbrances against the property.*" Docket 96 at 13.

The subject objection, however, bases its calculations on the "current fair market value of . . . not less than $370,000." Docket 140 at 3, ¶ 4. Mr. Barrett does not begin with the property's value as of date Anna Atkins passed away, over four years ago, when property values were significantly lower. The value assumption for Mr. Barrett's calculations then are inconsistent with the court's April 17 ruling on the reconsideration motion.

Second, Mr. Barrett's calculations do not take into account Dale Atkins's one-half interest in the property. Mr. Barrett complains that the $299,196.50 figure "is greater than any amount Dale Atkins could legally claim as a homestead exemption," without mentioning Dale Atkins' one-half interest in the property. Docket 140 at 3, ¶ 5.

As outlined in the court's April 17, 2017 ruling on the reconsideration motion, section 13550 provides that:

"*Except as provided in Sections 11446, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551.*"

Cal. Prob. Code § 13554(a) prescribes that "any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse."

Cal. Prob. Code § 13551 further prescribes that:

"*The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:*

"*(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.*

"*(b) The portion of the one-half of the community and quasi-community property belonging to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.*

"*(c) The separate property of the decedent that passes to the surviving spouse without administration.*"

Docket 96 at 11.

The court limited Mr. Barrett's recovery "to one-half of the real property's fair marker value" because that is all Mr. Barrett argued he was entitled to under California's statutory scheme.

Mr. Barrett had argued that – whether the real property was separate property or community property – Mr. Barrett is entitled only to one-half of the property in order to satisfy his judgment. Docket 55 at 3-5; March 7, 2017 Hearing on Application to Sell, Docket 67 at 2:45-55, 3:55-4:15, 18:27-55, *28:25-31:20* (emphasis added); April 17, 2017 Hearing on Reconsideration Motion, Docket 93 at 8:56-9:12. This is also what Mr. Barrett sought from the state court. Id. And, this court agreed by granting Mr. Barrett's reconsideration motion.

Finally, Mr. Barrett's calculations do not take into account the voluntary encumbrance against the property, in the amount of $51,393 according to Mr. Barrett. Docket 140 at 3.

As such, the $299,196.50 figure at which Mr. Barrett arrives in the objection makes no sense to the court. Given this, the objection will be overruled.

6.	09-30470-A-7 17-2140 FANG V. OCEAN QUEEN USA, INC. ET AL.,	SHAN FANG SGO-1	MOTION TO DISMISS ADVERSARY PROCEEDING, TO STRIKE AND TO ABSTAIN 8-30-17 [7]

Tentative Ruling: The motion will be granted in part.

The defendant, Ocean Queen U.S.A., Inc., asks for permissive abstention, arguing that the court should allow the state court, where the defendant obtained a breach of contract default judgment against the plaintiff, Shan Fang, to adjudicate the pending 11 U.S.C. § 523(a)(3)(B) claim. The defendant initiated a new proceeding in state court by filing a complaint on August 29, 2017 asserting a cause of action under 11 U.S.C. § 523(a)(3), including claims under section 523(a)(2), (a)(4), and (a)(6).

28 U.S.C. § 1334(c)(1) provides that "*[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case*

under title 11." This is discretionary abstention.

In the Ninth Circuit, the factors that a court must consider when deciding whether to apply discretionary abstention include:

(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,

(2) the extent to which state law issues predominate over bankruptcy issues,

(3) the difficulty or unsettled nature of the applicable law,

(4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

(7) the substance rather than form of an asserted "core" proceeding,

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

(9) the burden of [the bankruptcy court's] docket,

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor parties.

Christensen v. Tuscon Estates, Inc. (In re Tuscon Estate, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990).

Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

A pending state court proceeding exists, namely the defendant's state court action, asserting the same causes of action in this proceeding. The state court has concurrent jurisdiction over the section 523(a)(3) claims.

Section 523(a)(3) claims are not enumerated in the exclusive jurisdiction provision of section 523(c). See also Fidelity Nat'l Title Ins. Corp. v. Franklin (In re Franklin), 179 B.R. 913, 920 (Bankr. E.D. Cal. 1995).

Even though the defendant is asserting section 523(a)(2), (a)(4), and (a)(6) claims, fraud is at the center of the defendant's contentions. And, fraud under those claims is identical to the elements of actual fraud under state law, except for the reliance element. As such, state law issues dominate. The applicable law is not difficult or unsettled.

Having the state court adjudicate the plaintiff's claims will have no impact on the administration of the bankruptcy estate. The estate's administration was completed over eight years ago, in September 2009, when the plaintiff obtained a chapter 7 discharge and the case was closed. Case No. 09-30470, Dockets 14 & 16. The plaintiff's bankruptcy case has been over for over eight years and the subject proceeding has absolutely no bearing on the main bankruptcy case.

Given this, the court is persuaded that permissive abstention is warranted. Accordingly, the court will abstain and allow the state court action to proceed.

The court finds it unnecessary to address the service issues. Each side shall bear their own fees and costs.

7.	17-26125-A-11	FIRST CAPITAL RETAIL, L.L.C.	STATUS CONFERENCE 9-14-17 [1]

Tentative Ruling: None.

8.	17-26125-A-11 GEL-4	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO USE CASH COLLATERAL O.S.T. 10-6-17 [45]

Tentative Ruling: The motion will be conditionally granted.

First Capital Retail, L.L.C., the chapter 11 debtor, seeks authority to use the cash collateral of several creditors secured by fourteen retail franchise locations throughout California and owned and operated by the debtor. These retail franchises include Focus Brands such as Auntie Anne's, Cinnabon and Mrs. Fields. The cash collateral at issue is the income generated by the debtor's business transactions.

The motion seeks to approve use of cash collateral as of the petition date, September 14, 2017, through March, 2018 for the payment of the operating expenses as set forth in the budget described in the motion. Docket 47, Ex. A.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed budget includes labor, accounting, advertising, maintenance, insurance, technology, and miscellaneous expenses. See Docket 47, Ex. A.

The proposed use of cash collateral will preserve the going concern of the debtor's businesses, allowing the debtor to continue operating them, thus permitting realization of income through retail transactions. This is in the best interest of the estate and the creditors.

There are five creditors holding security interests against the debtor's cash: (1) ByLine Bank, successor by merger of Ridgestone Bank, SBA loan; (2) ByLine Bank, successor by merger of Ridgestone Bank, SBA construction loan; (3) ESBF California, L.L.C., factoring loan; (4) Global Merchant Cash, factoring loan;

(5) YellowStone Capital West L.L.C., factoring loan; and (6) World Global Financing, factoring loan.

The debtor proposes to remit to ByLine Bank monthly adequate protection payments of interest only payment on both notes in the total amount of $11,032.473 no later than the 15th of each month, such payments to be retroactive to the petition date.

As for the remaining factoring loans, the debtor proposed to not pay adequate protection payments. Rather, all excess funds will be set-aside in a DIP account, which the debtor will not use without further permission from creditors or the court. The debtor asserts that no adequate protection payment is required because the factoring loans are adequately protected by their security interest in the debtor's cash on hand, inventory, all assets-equipment and fixtures. The aggregate amount of the factoring debts is approximately $670,000.00, while the value of all of the debtor's assets is estimated at $15,953,121.78 as of the petition date. Therefore, factoring loans are over-secured. The debtor contends that the value of this collateral will not be diminishing during this case.

As further partial adequate protection for the continued use by the debtor of the cash, the debtor proposes to grant replacement liens in favor of the Byline Bank and the factoring lenders on the debtor's property.

The court will grant preliminary approval of the motion and will set a final hearing on the use of cash collateral on October 30, 2017 at 10:00 a.m. to allow the movant to provide interested parties with the notice required by Fed. R. Bankr. P. 4001(b). The court will authorize the requested use of cash collateral on a preliminary basis pending that hearing.

By authorizing cash collateral use, the court is not approving the compensation of professionals of the estate, even if such compensation is accounted for in the cash collateral budget.