UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: **TUESDAY**
DATE: **NOVEMBER 16, 2021**
CALENDAR: **1:30 P.M. ADVERSARY PROCEEDINGS**

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"**No Ruling**" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"**Tentative Ruling**" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"**Final Ruling**" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("$880," not "$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2055

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO AVOID AND RECOVER TRANSFERS AND TO DISALLOW CLAIMS
4-23-2020 [1]

HUSTED V. JACKSON MOVING & STORAGE INC.
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

The Motion to Compromise/Approve Settlement having been granted in the parent case on November 15, 2022, the Pre-Trial Conference is concluded. The court will issue a civil minute order.

2. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2060

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO AVOID AND RECOVER TRANSFERS AND TO DISALLOW CLAIMS
4-23-2020 [1]

HUSTED V. INTEGRA SUPPLY LLC.
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

The Motion to Compromise/Approve Settlement having been granted in the parent case on November 15, 2022, the Pre-Trial Conference is concluded. The court will issue a civil minute order.

3. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2061

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO AVOID AND RECOVER TRANSFERS AND TO DISALLOW CLAIMS
4-23-2020 [1]

HUSTED V. MCA FINANCIAL GROUP LTD.
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

The Motion to Compromise/Approve Settlement having been granted in the parent case on November 15, 2022, the Pre-Trial Conference is concluded. The court will issue a civil minute order.

4. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2072

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
5-21-2020 [8]

HUSTED V. PCM SALES, INC.
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

The Motion to Compromise/Approve Settlement having been granted in the parent case on November 15, 2022, the Pre-Trial Conference is concluded. The court will issue a civil minute order.

5. 18-22453-A-7 **IN RE: ECS REFINING, INC.**
20-2078

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO AVOID AND RECOVER TRANSFERS AND TO DISALLOW CLAIMS
4-24-2020 [1]

HUSTED V. RED RIVER LOGISTICS, LLC
CHRISTOPHER SULLIVAN/ATTY. FOR PL.

Final Ruling

The Motion to Compromise/Approve Settlement having been granted in the parent case on November 15, 2022, the Pre-Trial Conference is concluded. The court will issue a civil minute order.

6. 21-23159-A-7 **IN RE: BRITANI DAVIS**
21-2067

STATUS CONFERENCE RE: COMPLAINT
9-8-2021 [1]

DAVIS V. AMERICAN HONDA FINANCE ET AL
BRITANI DAVIS/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

7. 19-26964-A-7 **IN RE: LYNN HARRINGTON**
20-2017

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-18-2020 [1]

EL DORADO COUNTY V. HARRINGTON
JAMIE DREHER/ATTY. FOR PL.

Final Ruling

The status conference is continued to January 19, 2022, at 1:30 p.m. Not later than January 5, 2022, the parties shall file a joint status report. A civil minute order shall issue.

8. 19-25064-A-11 **IN RE: SLIDEBELTS INC.**
21-2052

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-16-2021 [1]

SLIDEBELTS, INC. V. PARSON,
BEHLE, AND LATIMER ET AL

No Ruling

9. 19-25064-A-11 **IN RE: SLIDEBELTS INC.**
21-2052 BMR-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
10-13-2021 [13]

SLIDEBELTS, INC. V. PARSON,
BEHLE, AND LATIMER ET AL
UNKNOWN TIME OF FILING/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Matter: Motion to Dismiss
Notice: BLR9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

This dispute arises from 52 words contained in the order dismissing Slidebelts' first Chapter 11 case. That order provides: "[N]ot later than August 10, 2020, the debtor shall simultaneously pay all professionals holding an approved administrative claim under 11 U.S.C. § 503(b)...in full, i.e., the entire amount of compensation and expenses approved by the court or if payment in full is not possible, shall pay such claims pro-rata..."

Administrative claimants were in the first Chapter 11 case were not paid in full and some, including the defendants herein, received more than others on a percentage basis. Later, Slidebelts confirmed a plan of reorganization in a second Chapter 11 case. That plan requires Slidebelts to make best efforts to equalize the priority payments due in the first Chapter 11 case.

Here, the plaintiff debtor filed an adversary proceeding to do just that. Defendant recipients contend that the order may not be enforced.

FACTS

Slidebelts, Inc. manufactures men's and women's belts. Facing financial headwinds, it sought the protections of the bankruptcy court.

First Bankruptcy

In August 2019, Slidebelts, Inc. filed a Chapter 11 bankruptcy. Vol. Pet., *In re Slidebelts, Inc.*, No. 19-25064 (Bankr. E.D. Cal. 2019), ECF No. 1 ("Slidebelts I").[1] The petition did not elect treatment as small business debtor or under Subchapter V debtor. Slidebelts hired, and the court approved, Parsons Behle as its counsel and Advanced CFO as its financial advisor. Orders, Slidebelts I, ECF No. 99, 101.

Thereafter, Slidebelts hired two other professionals to assist it in its effort to reorganize: (1) Knobbe, Martens, Olson & Bear LLP as special counsel with respect to intellectual properties issues, Order, Slidebelts I, ECF No. 197; and (2) Eisner Amper LLP as its accountant. Order, ECF No. 217.

In March 2020, the U.S. Trustee appointed a committee of unsecured creditors. Notice of Appointment, Slidebelts I, ECF No. 222. The committee hired, and this court approved, employment of counsel, Brinkman Portillo Ronk, and a financial advisor, Dundon Advisors. Orders, Slidebelts I, ECF No. 293, 318.

During the bankruptcy Slidebelts faced two particular impediments to reorganization. First, the debtor's eligibility to obtain a Paycheck Protection loan while under the protection of the bankruptcy court was an issue. The debtor contended that it was so entitled; the Small Business Administration, who administered those loans disagreed. In fact, in April 2020, Slidebelts had received a Paycheck Protection loan in the amount of $350,000, after misrepresenting in its loan application that it was not under the protection of the bankruptcy court. The Small Business Administration cried foul. Since a central component of the debtor's plan involved such a Paycheck Protection Plan loan the debtor's inability to resolve the issue presented particular problems.

[1] The court takes judicial note of the docket in Slidebelts I. Fed. R. Evid. 201(b)(2).

Second, the debtor and the committee of unsecured creditors did not share a common vision for the best path forward. Not only did this preclude a consensual plan but the disagreement, and resultant friction between the parties and counsel, generated what the debtor perceived to be unnecessary and welcome administrative expenses that would need to be paid as a part of the plan.

In April 2020, the debtor attempted to dispatch the unsecured creditors committee, and its counsel, as well as financial advisors, by filing an Amended Voluntary Petition, which made a Subchapter V election. Am. Pet. Item # 8, ECF No. 263; 11 U.S.C. §§ 1102, 1181(b) (Subchapter V cases do not ordinarily have committees). The United States Trustee appointed Walter Dahl, as the Subchapter V trustee. Notice, ECF No. 281. Less than one week later, the debtor withdrew its Amended Petition, Notice, ECF No. 288, and Walter Dahl ceased his work as the Subchapter V trustee. Notice of Resignation, ECF No. 298.

Also in April 2020, Slidebelts filed a disclosure statement. Disclosure Statement, ECF No. 243. The disclosure statement was scheduled to be heard in early June 2020. First Community Credit Union, a creditor, and the Unsecured Creditors Committee opposed the disclosure statement and the plan on which it was based. Oppos., ECF No. 323, 332.

Dissatisfied by the SBA's objection to obtaining a Paycheck Protection Plan loan during a bankruptcy and by the Unsecured Creditors Committee's opposition its plan—and the mounting professional fees arising from that opposition, in June 2020, Slidebelts moved to dismiss it case. Prior to that date, after obtaining court approval, Slidebelts paid compensation and expenses its own professionals, i.e., Parsons Behle, Advanced CFO and Knobbe Martens Olson & Bear LLP, but not to other professionals, e.g., committee counsel and financial advisors. As Slidebelts explained its request to dismiss the case, it wanted to "refile under Subchapter V of Chapter 11" and "apply for Paycheck Protection Program funds while the case is dismissed.'" *Id.* 1:21-24.

At the same time, Parsons Behl final application for compensation. Appl. for Compensation, ECF No. 368. It sought additional compensation of $67,753.50 and expenses of $6,167.82.

At oral argument on the motion to dismiss, committee counsel, Brinkman Portillo Ronk, suggested that allowing Slidebelts' attorneys and financial advisor to retain fees paid without pro-rata payment to other professionals was a "effectively a structured dismissal" in violation of priority scheme. 11 U.S.C. §§ 503(b)(2), 507(a)(2); *Czyzewski v. Jevic Corp.*, 137 S.Ct. 973, 983-985 (2017). At the conclusion of the hearing the court granted the motion without conditioning it on payment of all professionals on a pro-rata basis. But it later reconsidered the point and issued the following order:

> Upon further reflection, the court modifies its rulings on the debtor's motion to dismiss and debtor's counsel's application for compensation:

1. debtor's motion to dismiss the chapter 11 case is granted, and the case is hereby dismissed;

2. as to Parsons Behle & Latimer's ("the firm") motion for additional compensation and request to finalize all interim application for compensation and reimbursement, it is hereby ordered that the application is granted to the extent provided herein: [A] the firm's first interim application for compensation and reimbursement in the amounts of $46,847.50 and $8,104.24, respectively, are approved on a final basis; [B] the firm's second interim application for compensation and reimbursement in the amounts of $60,708.00 and $2,286.86, respectively, are approved on a final basis; [C] the firm's third and final application for compensation and reimbursement in the amounts of $67,753.50 and $6,167.81, respectively, are approved on a final basis; [D] all other requests for compensation and expenses are disapproved;

3. debtor shall not make further payment of administrative expenses, 11 U.S.C. §§ 503(b), 507(a)(2), to any claimant (including its counsel) and Parsons Behle & Latimer shall not apply retainer, if any, held to such approved administrative expenses, except as provided herein;

4. not later than July 13, 2020, any professional holding an administrative claim, 11 U.S.C. §§ 503(b), 507(a)(2), shall file and serve such final applications for approval as are required by the code and/or rules, noticed under LBR 9014-1(f)(2) and shall set the matter for hearing on August 3, 2020, at 1:30 p.m.; opposition be filed not later than July 27, 2020; reply is waived;

5. not later than August 10, 2020, the debtor shall simultaneously pay all professionals holding an approved administrative claim under 11 U.S.C. § 503(b): [A] in full, i.e., the entire amount of compensation and expenses approved by the court or if payment in full is not possible, shall pay such claims pro-rata, *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 fn. 22 (9th Cir. 1983) (insolvent estates pay administrative claims pro-rata); *In re Lazar*, 83 F.3d 306, 308-09 (9th Cir. 1996); *Czyzewski v. Jevic Corp.*, 137 S.Ct. 973, 983-85 (2017) (dismissal of chapter 11 may not be used to order bankruptcy code priorities with the consent of the affected party); [B] file a declaration

specifying in detail compliance with paragraph 5(A) hereof.

...

8. the court retains jurisdiction over applications for, as well as payment of, administrative claims and to enforce the terms of this order.

Order, ECF No. 403.

The 52 words that comprise ¶ 5(A) of the order give rise to this adversary proceeding.

Second Bankruptcy

In August 2020, Slidebelts, Inc. filed a second Chapter 11 bankruptcy. Vol. Pet., *In re Slidebelts, Inc.*, No. 20-24098 (Bankr. E.D. Cal. 2020), ECF No. 1 ("Slidebelts II").[2] Vol Pet., ECF No. 1. This case was filed as a Subchapter V, Chapter 11.

Slidebelts proposed, and consensually confirmed, a plan of reorganization. Order, Slidebelts II, ECF No. 355. The plan preserves to the debtor the right to recover payments from Parsons Behl & Latimor, Knobbe Martens, and Advanced CFO as preference payments, 11 U.S.C. § 547, or in amounts in excess of the dismissal order. Order ¶ 5(A), ECF No. 403; Plan of Reorganization § II.4(c), ECF No. 281. It also revested property in the debtor on the effective date, retained and revested all cause of action in the debtor and retained jurisdiction. *Id.* at §§ IX.1, IX.3, X.5(2),(3).

PROCEDURE

After confirmation of the plan in Slidebelts II, the debtor filed this adversary proceeding against Parsons, Behle, and Latimer; Advanced CFO; and Knobbe Martens Olson & Bear contending that they received $41,130.92, $7,296.89, and $2,487.93, respectively, in excess of the pro-rata amount authorized by this court. Order, ECF No. 403 ¶ 5(A). This motion followed.

JURSIDICTION

This court has jurisdiction. 28 U.S.C. §§ 1334(a)-(b), 157(b); *see also* General Order No. 182 of the Eastern District of California. Jurisdiction is core. 28 U.S.C. § 157(b)(2)(A); 11 U.S.C. §§ 503(b), 507(a)(2).

[2] The court takes judicial note of the docket in Slidebelts II. Fed. R. Evid. 201(b)(2).

DISCUSSION

Order Dismissing Slidebelts I

Defendants Parsons Behle and Advanced CFO argue that the order dismissing Slidebelts I does not create any right to recover from them. Mem. P. & A. 1:11-15, 3:15-16, 8:23-28, ECF No. 15.

This court disagrees. Long-standing precedent authorizes this court to construes its own orders. *Travelers Indemnity Company v. Bailey*, 557 U.S. 137, 151, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009); *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013).

The order dismissing Slidebelts I was an order designed to address a defacto structured dismissal that altered the priority of distributions to administrative creditors, Czyzewski v. Jevic Corp., 137 S.Ct. 973, 983-985 (2017), by ordered them to be paid in parity. 11 U.S.C. §§ 503(b), 507(a)(2); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 fn. 22 (9th Cir. 1983) (insolvent estates pay administrative claims pro-rata); *In re Lazar*, 83 F.3d 306, 308-09 (9th Cir. 1996). The order described the end result; it made no effort to specify the mechanism by which that result was obtained. But if necessary to achieve parity in treatment of administrative creditors, Slidebelts' adversary proceeding to recover those overages was well within the terms of this court's order.

Standing

The defendants argue Slidebelts lacks standing. Their argument has two parts. First, the defendants argue that they owe Slidebelts nothing. Second, they argue that Slidebelts may not assert the interests of individual creditors. From that they conclude that Slidebelts has not suffered an injury in fact and, therefore, that it lacks standing. Mem. P. & A. 6:23-7:12, ECF No. 15.

Recently, the Supreme Court has had the opportunity to address standing in *Spokeo*:

> To establish "a case or controversy" within the meaning of Article III, plaintiff must show the following as an "irreducible minimum": [1] Injury in fact: An "injury in fact" that is concrete and particularized, actual or imminent, and not hypothetical or conjectural; [2] Causation: A causal connection between the injury and defendant's conduct or omissions; and [3] Redressability: A likelihood that the injury will be redressed by a favorable decision. [*Spokeo, Inc. v. Robins* (2016) 578 US , , 136 S.Ct. 1540, 1547; *Lujan v. Defenders of Wildlife* (1992) 504 US 555, 560-561, 112 S.Ct. 2130, 2136].

Virginia A. Phillips and Karen L. Stevenson, *Federal Civil Procedure Before Trial, Calif. & Ninth Cir. Edits*. §2:4105 (Rutter Group April 2021).

"Injury in fact is an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent", "not

conjectural or hypothetical". [*Spokeo, Inc. v. Robins* (2016) 578 US , , 136 S.Ct. 1540, 1548; *Summers v. Earth Island Inst.* (2009) 555 US 488, 495-496, 129 S.Ct. 1142, 1150-1152." *Id.* at § 2:4150.

Federal courts have long recognized that economic injury satisfies the injury in fact requirement. *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, (1977); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069-1072 (9th Cir. 2011). As the Supreme Court articulated it, "[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

Here, Slidebelts has suffered an injury in fact. "Ordinarily, plaintiff cannot maintain a federal civil action to redress injuries to others, or to assert the rights of third persons. [*Kowalski v. Tesmer* (2004) 543 US 125, 134, 125 S.Ct. 564, 570." *Id.* at 2:4196. But an exception exits:

> However, plaintiff may be permitted to assert the constitutional or statutory rights of third parties if: [1] the litigant suffered "injury in fact"; [2] plaintiff has a close relationship with the third party so as to have consistent interests; and [3] it would be difficult or impossible for such parties to assert their rights themselves. [*Powers v. Ohio* (1991) 499 US 400, 410-411, 111 S.Ct. 1364, 1370-1371].

Id. at 2:4197.

Powers controls here. Slidebelts itself has suffered a palpable economic injury. That injury manifested itself in reduced assets to pay administrative creditors in Slidebelts I and now in added administrative costs, i.e., professional fees, arising from the need to enforce this court's order of dismissal. Order, ECF No. 403. Moreover, Slidebelts and the underpaid administrative creditors have consistent interests. Administrative creditors within a case must be paid in full or at least on an equal footing. *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 fn. 22 (9th Cir. 1983) (insolvent estates pay administrative claims pro-rata); *In re Lazar*, 83 F.3d 306, 308-09 (9th Cir. 1996). Once this court issued its order implementing those provisions, Order ¶ 5(A), ECF No. 403, the interest of the debtor and administrative creditors were wholly aligned. Finally, administrative creditors in Slidebelts I may not enforce this court's order. Plan of Reorganization § II.4(c), ECF No. 281 ("debtor may recover" payments to Parsons Behle, Knobbe Martens and/or Advanced CFO); 11 U.S.C. § 1141(a) (plans bind). The debtor's confirmed plan in Slidebelts II reserves the right to recover these payments to the debtor, and creditors may not so act. *Estate of Spiritos v. One San Bernadino County Superior Court Case No. SPR02211*, 443 F.3d 1172 (9th Cir. 2006).

For each of these reasons the court finds that Slidebelts has standing.

Jurisdiction

Bankruptcy jurisdiction is well known. 28 U.S.C. §§ 1334, 157. This court has jurisdiction over cases and over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. 1334(b).

"Related to" jurisdiction refers to matter affecting the adjustment of the debtor-creditor relationship.

> Under this formulation, the test is whether: the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. Id. (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984)).

In re Pegasus Gold Corp., 394 F.3d 1189, 1193 (9th Cir. 2005).

In Chapter 11 post-confirmation related to jurisdiction is much narrower. Conceding for the sake of argument that "all erstwhile administrative priority claims in [Slidebelts I] were transformed [into] simple pre-petition general unsecured claims" in Slidebelts II, Mem. P. & A. 8:10-13, ECF NO. 15, and that jurisdiction is merely of the "related to" variety, this court still has jurisdiction over the issue. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005). As the circuit has applied the *Pacor* test to post-confirmation Chapter 11 matters:

> The "close nexus" test determines the scope of bankruptcy court's post-confirmation "related to" jurisdiction. Pegasus Gold Corp., 394 F.3d at 1194. As adopted from the Third Circuit, the test encompasses matters "affecting the 'interpretation, implementation, consummation, execution, or administration of the confirmed plan.' " Id. (quoting *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 166–67 (3d Cir.2004)). The close nexus test "recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility." *Id.*

In re Wilshire Courtyard, 729 F.3d 1279, 1287 (9th Cir. 2013).

Here, the confirmed plan in Slidebelts II specifically addressed the issue of the over-payment of administrative creditors in Slidebelts I. It recognized that Parson Behle, Knobbe Martens and Advanced CFO had been overpaid vis-à-vis other unsecured administrative creditors in Slidebelts I, reserved the right to recover such overpayment, and provided for payment of the recovered funds to the administrative creditors in Slidebelts I. Plan of Reorganization § II.4(c)(1), ECF No. 281. Since the adversary proceeding directly implements the

terms of the confirmed plan vis-à-visa formerly administrative creditors, it satisfies the *Pacor* test for related to jurisdiction, *Pegasus Gold Corp.*, 394 F.3d at 1193; since it involves interpretation of the dismissal order and the confirmed plan, it involves "substantial question[s] of bankruptcy law" and, therefore, satisfies the "close nexus" test. *Wilshire Courtyard*, 729 F.3d at 1285, 1287-1290.

Finally, the court is not persuaded by the defendant's arguments that the filing of Slidebelts II precludes this court from resolving any remaining administrative claim issues in Slidebelts I. The debtor has confirmed a plan of reorganization. Plan, ECF No. 355. The terms of that plan bind. 11 U.S.C. § 1141(a); *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995). Moreover, the confirmation order has res judicata effect on issues that were raised in conjunction with plan confirmation or could have been raised at that time. *Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 654–55, 65 S.Ct. 539, 89 L.Ed. 528 (1944); *Katchen v. Landy*, 382 U.S. 323, 334, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938). Here, the plan: (1) provides for the prosecution of preference and/or Jevic based claims against Parsons Behle, Knobbe Marten and Advanced CFO, Plan § II.4(c)(1); (2) revests assets of the estate (including "claims" and "choses in action") in the post-confirmation debtor, Plan at § IX.1; (3) retains and revests causes of action in the debtor, Plan at § IX.3; and (4) retains jurisdiction implement the plan and to resolve disputes, Plan at § X.5. The simple point is this: the defendants' arguments as to where rights arising out of the administration of Slidebelts I now reside are wholly overridden by the terms of the confirmed plan.

Failure to State a Claim

The law of Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121–22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory"); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering the sufficiency of the complaint, the court may consider the factual allegations in the complaint itself and some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes

extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).
After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). *See generally*, *Wagstaff Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

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

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

Here, the complaint states at least two plausible theories of recovery against the defendants.

Causes of action recognized by Thomas Corp. and by Chochise Park

Circuit courts have long understood that a trustee, or in this case, a debtor in possession, 11 U.S.C. §§ 1101(1), 1107(a), has the right to recover overpayments to administrative creditors. *Thomas Corp. v. Nicholas*, 221 F.2d 286, 290 (5th Cir. 1955) (trustee "may of course have rights to recover money paid to the other creditors which has unjustly enriched them"); *In re Contractor Technology, Ltd.*, 345 B.R. 800, 805-806 (Bankr. S.D. Tex. 2006); see also, 11 U.S.C. § 502(j) (reconsideration of claims); *In re Adkins*, 425 F.3d 296, 304 n 14 (6th Cir. 2005) (suggesting application of § 502(j) to administrative claims).

The Ninth Circuit has explained its thinking on the issue very clearly. *In re Chochise College Park, Inc.*, 703 F.2d 1339 1356 n. 22 (9th Cir. 1983).

> *All administrative expense creditors must be treated with "absolute equality," unless, of course, some creditors, with full knowledge of the facts, have agreed to subordinate their claims.* In this case, previous disbursements to other administrative expense creditors of the Cochise estate could possibly prevent the appellants from recovering that pro rata share of the assets of the estate that they would have received if all disbursements had been delayed until the trustee's final accounting. The trustee, not having given notice to the land purchasers, is therefore personally liable for the difference. *Under principles of restitution, the trustee may well have rights to recover money paid to other creditors that has unjustly enriched them; regardless of those rights, however, he is liable to the land sale purchasers for the share they otherwise would have received.*

In re Cochise Coll. Park, Inc., 703 F.2d 1339, 1356 (9th Cir. 1983) (internal citation omitted) (emphasis added), citing *Thomas Corp. v. Nicholas*, 221 F.2d 286, 290 (5th Cir. 1955).

That alone is a sufficient basis to deny defendants' motion.

Turnover: 11 U.S.C. § 542

Section 542 provides:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).[3]

There are limitations to the reach of § 542.

> Property subject to a turnover action is limited to identifiable estate property and money due to the debtor without dispute. *The turnover provision cannot be used to create or expand the debtor's interest in property beyond what existed on the petition date.* [*In re Graves* (10th Cir. 2010) 609 F3d 1153, 1157-1158—trustee could not compel turnover of tax refund applied as prepayment to future year's tax liability because tax refund was not in debtor's control on petition date; *compare In re Newman* (9th Cir. BAP 2013) 487 BR 193, 202—debtor who received—and spent—tax refund postpetition was ordered to pay Chapter 7 trustee prorated portion of refund attributable to income earned prepetition].

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 21:1709 (Rutter Group December 2020).

As of August 25, 2020, the date Slidebelts II was filed, the debtor's rights to recover payment were fixed. The order dismissing the case bars dispute. Order ¶ 5(A), ECF No. 355. Moreover, as of August 20, 2020, all applications for compensation had been heard and, therefore, the amount necessary to equalize payment to administrative claimants was subject to mathematical computation. Moreover, the computation is not difficult. "Unless further facts requiring another computation are shown, the method of computing the appellant's share of the bankrupt's assets would be to multiply the total of its claim by the ratio of total receipts in the two accounts to the sum of the actual disbursements..." *Thomas Corp. v. Nicholas*, 221 F.2d 286, 290 (5th Cir. 1955); *see also, In re Florida West Gateway, Inc.*, 180 B.R. 299, 302 (Bankr. S.D. Fla. 1995).[4]

For these reasons, Slidebelts has stated a cause of action.

CONCLUSION

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

Parson Behle & Latimer and Advanced CFO's motion has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied;

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[3] The defendants do not argue that 11 U.S.C. § 542(c), (d) apply here.
[4] Though the plan contemplates a preference action against these defendants, Plan § 11.4(c)(1), the plaintiff has not so plead and the court need not consider that issue.

IT IS FURTHER ORDERED that not later than December 7, 2021, Parson Behle & Latimer and Advanced CFO shall file an answer to the complaint;

IT IS FURTHER ORDERED that the parties shall not enlarge time for Parson Behle & Latimer and Advanced CFO to file an answer without leave of court; and

IT IS FURTHER ORDERED that in the event that Parson Behle & Latimer and Advanced CFO, or any of them, shall fail to file a an answer in a timely manner the plaintiff shall forthwith and without delay seek entry of the non-answering party's default.

10. 21-22871-A-7 **IN RE: NATHAN SHAW**
21-2060

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-18-2021 [1]

UNCLE CREDIT UNION V. SHAW
TIMOTHY SILVERMAN/ATTY. FOR PL.

No Ruling

11. 21-22871-A-7 **IN RE: NATHAN SHAW**
21-2060 GLF-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR SUMMARY JUDGMENT
10-6-2021 [10]

UNCLE CREDIT UNION V. SHAW
UNKNOWN TIME OF FILING/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Matter: Dismiss the Complaint or, in the Alternative, for Summary Judgment
Notice: LBR 9014-1, 7056-1; written opposition required
Disposition: Denied
Order: Civil minute order

Defendant/debtor Nathan William Shaw ("Shaw") moves to dismiss the complaint filed against him or, in the alternative, for summary judgment. Plaintiff Uncle Credit Union ("UCU") opposes the motion.

FACTS

Since 2004, Shaw has been employed at Trader Joe's, a grocery story. As plead, he had been the Store Manager and enjoyed a wage of $3,500 per month. In February 2021, his position and pay was downgraded to Crew Member. His wages dropped from $3,500 per month to $2,981 per month.

In March 2011, after his position had been downgraded, he applied for a credit with the plaintiff. He represented that he was employed as a "Store Manager" and that his wage was $3,500 per month. UCU approved the application and issued him a credit card.

Shaw then used credit card to consolidate two large credits with Bank of America, with an aggregate balance of $27,875.

Shaw made "a few payments," Compl. 3:20-22, and filed a Chapter 7 bankruptcy. In support of his petition, Shaw filed Schedule I, in which he described himself as a "Crew Member" at Trader Joe's with gross wages of $2,981 per month. On Line 13 of Schedule I Shaw stated, "Debtor's position changed at his place of employment in February 2021 and his hourly rate decreased. Thus[,] his projected income is lower than the 6 month average income reported on Form 22. This accounts for the discrepancy."

PROCEDURE

Plaintiff UCU filed an adversary against Shaw seeking to except the debt from discharge, citing 11 U.S.C. § 523(a)(2)(A) (implied representation of payment) and 11 U.S.C. § 523(a)(2)(B) (false financial statement).

This motion followed.

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); see also General Order No. 182 of the Eastern District of California. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). Neither party has signaled consent, or the lack of consent, to the entry of final orders and judgments by this court. Fed. R. Bankr. P. 7008; 7012(b).

DISCUSSION

Summary Judgment

This court has discretion not treat a Rule 12(b)(6) motion as a motion for summary judgment, Rule 56. *In re Mortg. Electronic Registration Systems, Inc.*, 754 F.3d 772, 781 (9th Cir. 2014) (only a summary judgment if the trial court actually relies on extrinsic

evidence). But it will not do so in this case. First, local rules preclude joinder of motions.

> Joinder. Every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except (1) that relief in the alternative based on the same statute or rule may be filed in a single motion; and (2) as otherwise provided by these rules. Without incorporation by reference to any other document, exhibit or supporting pleading, the motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Where the motion combines requests for relief with differing notice periods or persons entitled to notice, the movant shall give notice consistent with the more expansive notice requirements.

LBR 9014-1(d)(5) (emphasis original).

This motion constitutes an improper joinder under the Local Rules in and for the Eastern District of California Bankruptcy Court.

Second, even were that of no import, the court would decline to exercise its discretion to convert the matter to a motion for summary judgment. Conversion of a motion from Rule 12(b)(6) to Rule 56 is disfavored. "Conversion is generally disfavored if "(1) the motion comes quickly after the complaint was filed, (2) discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion, or (3) the nonmovant does not have reasonable notice that a conversion might occur." [*Rubert-Torres v. Hospital San Pablo, Inc.* (1st Cir. 2000) 205 F3d 472, 475]."

Virginia A. Phillips and Karen L. Stevenson, Federal Civil Procedure Before Trial § 9:237 (Rutter Group April 2021). Here, the complaint was filed August 18, 2021. The instant motion followed on October 6, 2021, less than 60 days later. Discovery is in its early stages, and it is premature to consider summary judgment. For these reasons, the court will not deem the motion to be for summary judgment and will not consider the documentary evidence submitted by Shaw. Req. for Judicial Notice, ECF No. 11.

Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121–22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory

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

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).
After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). *See generally*, *Wagstaff Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

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

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d

473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, Wagstaff, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility, and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

11 U.S.C. § 523(a)(2)(A)

To succeed on a nondischargeability claim under § 523(a)(2)(A), a creditor must establish five elements:

> (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.

Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000).

Plaintiff UCU has plead a plausible claim of § 523(a)(2)(A) fraud. Absent a presumption of fraudulent intent, 11 U.S.C. § 523(a)(2)(C), fraudulent intent in the use of a credit card must be prove fraudulent intent and justifiable reliance.

> [A] credit card issuer seeking a nondischargeability determination must prove fraudulent intent and justifiable reliance. *The Ninth Circuit has adopted a "totality of the circumstances" theory, under which a court may infer the existence of the debtor's fraudulent intent not to pay a credit card debt "if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor.*

In re Eashai, 87 F.3d 1082, 1087 (9th Cir. 1996) (emphasis added).

In considering the totality of the circumstances, the court may consider a multitude of factors:

> Factors considered: Under the totality of the circumstances theory, evidence of the debtor's fraudulent intent in connection with credit card debt may be inferred from the following factors: [1] the length of

> time between when the charges were made and the bankruptcy was filed; [2] whether an attorney was consulted concerning the filing of bankruptcy before the charges were made; [3] the number and amount of charges made; [4] whether the debtor made multiple charges on the same day; [5] the debtor's financial condition at the time the charges were made; [6] whether the charges were above the debtor's credit limit; [7] whether the debtor was employed; [8] the debtor's prospect for employment; [9] the debtor's financial sophistication; [10] whether there was a sudden change in the debtor's buying habits; and [11] whether the purchases were made for luxuries or necessities. [*In re Ettell* (9th Cir. 1999) 188 F3d 1141, 1144, fn. 2; *In re Eashai*, supra, 87 F3d at 1087-1088; *In re Lee* (9th Cir. BAP 1995) 186 BR 695, 699].

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:509 (Rutter Group December 2020).

Subject only to the limitations of *Iqbal* and *Twombly*, the pleading bar is low. Shaw interposes two arguments. First, he contends that the facts do not support a plausible claim of fraud. This court disagrees. A Rule 12((b)(6) motion should not be granted where competing inference exist, unless the inference in favor of the defendant is an "obvious alternative explanation" that renders the other inference implausible. *Marcus & Millichap Co.*, 751 F.3d at 996; *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013). Here, the same two facts, proximity of the credit application, March 2021, and the bankruptcy petition, August 2021, and the existence of only "a few payments" give rise to two competing inferences: one that the debtor intended to pay and the other that he didn't intend to pay. Neither is stronger than the other. This alone creates a plausible claim.

Second, Shaw argues that the "Balance Transfer Request Form," Compl., Ex. 2, ECF No. 2, negative justifiable reliance. Here, UCU has plead two theories of fraud: (A) lack of knowledge of the balance transfer, Compl. ¶ 15, ECF No. 1; and (B) implied intent to pay, Id. ¶ 16. Even if the court were to accept Shaw's argument as to the first theory, the second theory remains.

For each of these reasons the court finds that UCU has plead a plausible action for fraud, 11 U.S.C. 523(a)(2)(A).

11 U.S.C. 523(a)(2)(B)

The elements of § 523(a)(2)(B) fraud are well-established.

> According to the Ninth Circuit, a creditor seeking to establish § 523(a)(2)(B) nondischargeability must show: [1] it provided the debtor with money, property, services

> or credit based on a written representation of fact by the debtor respecting the debtor's financial condition; [2] the representation was materially false; [3] the debtor made the representation with the intention of deceiving the creditor; [4] the creditor relied on the representation; [5] the creditor's reliance was reasonable; and [6] damage proximately resulted from the representation. [*In re Siriani* (9th Cir. 1992) 967 F.2d 302, 304; *In re Candland* (9th Cir. 1996) 90 F3d 1466, 1469].

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:547 (Rutter Group December 2020).

Here, the key is a discrepancy between stated and actual income, $3,500 on the credit application and $2,981 per month. Defendant has overstated his income by 17% on the credit application. A reasonable trier of fact could deem this material. And from that the remainder of the elements of § 523(a)(2)(B) fraud follow.

Shaw argues that Form 122A-1 shows an average income of an amount greater, not less than, $3,500, and that the court may take judicial notice of these facts. According to Shaw his income in February 2021 was $3,517 and in March 2021 was $6,668.19. Pet., 122A-1 p. 42, ECF No. 1. From this he concludes that there was no misrepresentation. Assuming that this court may properly take judicial notice of the admissions contained in the debtor's petition, schedules and statements, there are two problems with Shaw's argument. Inconsistent pleading, even inconsistent factual pleading, is permissible. Fed. R. Civ. P. 8(d)(3), *incorporated by* Fed. R. Bankr. P. 7008; *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2nd Cir. 1994); PAE Government Services, Inc. v. MPRI, Inc., 514 F.3d 856, 860 (9th Cir. 2007) ("inconsistent allegations are simply not a basis for striking the pleading"). As one court so thoughtfully articulated the issue:

> Clearly, *a policy which permits one claim to be invoked as an admission against an alternative or inconsistent claim would significantly restrict, if not eliminate, the freedom to plead inconsistent claims provided by Rule 8(e)(2)*. Thus, courts have been reluctant to permit one pleading to be read as a judicial or evidentiary admission against an alternative or inconsistent pleading.

Molsbergen v. United States, 757 F.2d 1016, 1019 (9th Cir. 1985) (emphasis added).

But even that isn't the real problem. The factual discrepancies as to Shaw's income at a particular point in time were created by Shaw himself. *Compare* Schedule I (reflecting gross income of $2,981 per

month) with Form 122A-1 p. 42, ECF No. 1 (showing February 2021 income of $3,517 per month and March 2021 income of $6,668.19 per month). Certainly, UCU has posited its adversary proceeding on the most favorable version of the Shaw's facts. But it would be appropriate to treat as a judicial admission on UCU's part.

For each of these reasons, UCU has plead a plausible action for fraud, 11 U.S.C. 523(a)(2)(B).

CONCLUSION

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

Nathan William Shaw's motion has been presented to the court. Having considered the [motion/application/objection] together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that not later than November 30, 2021, Nathan William Shaw shall file an answer to the complaint;

IT IS FURTHER ORDERED that the parties shall not enlarge the time for Nathan William Shaw to file an answer to the complaint without court order; and

IT IS FURTHER ORDERED that in the event that Nathan William Shaw fails to file a timely answer to the complaint, Uncle Credit Union shall forthwith and without delay seek entry of his default.

12. 19-24685-A-13 **IN RE: EMILIA ARDELEAN**
19-2135

PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT TO DETERMINE DISCHARGABLITY OF A DEBT
1-21-2020 [17]

MASSIOUI V. ARDELEAN
MICHAEL HARRINGTON/ATTY. FOR PL.

Final Ruling

The adversary proceeding dismissed, the pretrial conference is concluded.

13. 19-24685-A-13 **IN RE: EMILIA ARDELEAN**
19-2135 TBG-5

CONTINUE MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR PARTIAL SUMMARY JUDGMENT
8-24-2021 [114]

MASSIOUI V. ARDELEAN
DANIEL GRIFFIN/ATTY. FOR MV.
RESPONSIVE PLEADING

Final Ruling

The adversary proceeding dismissed, the motion for summary judgment is dropped from calendar.

14. 20-23487-A-7 **IN RE: MARCIE OKPAKPOR**
20-2164 FI-4

MOTION TO VACATE AND/OR MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
10-21-2021 [73]

OKPAKPOR V. OKPAKPOR
BARRY SPITZER/ATTY. FOR MV.

Final Ruling

Relief granted by order, ECF No. 82, the matter is dropped from calendar.

15. 21-22096-A-7 **IN RE: KANI JAHNKE**
21-2055

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-2-2021 [1]

JAHNKE V. JAHNKE
JAMES MCGRATH/ATTY. FOR PL.

No Ruling

16. 21-22096-A-7 **IN RE: KANI JAHNKE**
21-2055 FEC-1

ORDER TO SHOW CAUSE
10-6-2021 [9]

JAHNKE V. JAHNKE
RESPONSIVE PLEADING

No Ruling