

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, November 17, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [18-13311](#)-A-13 **IN RE: MELINDA MARTINDALE**
[DMG-4](#)

MOTION TO MODIFY PLAN
10-7-2022 [[153](#)]

MELINDA MARTINDALE/MV
D. GARDNER/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

2. [22-11116](#)-A-13 **IN RE: THEDFORD JONES**
[MJB-2](#)

MOTION TO CONFIRM PLAN
10-6-2022 [[52](#)]

THEDFORD JONES/MV
MICHAEL BERGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This matter is DENIED WITHOUT PREJUDICE for improper notice.

The Clerk's Matrix of Creditors used by the moving party to serve notice of the motion does not comply with Local Rule of Practice ("LBR") 7005-1(c), which requires that the Clerk's Matrix of Creditors used to serve a notice be downloaded not more than 7 days prior to the date notice is served. Here, the moving party served notice of the motion on October 6, 2022 using a Clerk's Matrix of Creditors that was generated on September 14, 2022. Doc. #55. Accordingly, service of notice of the motion does not comply LBR 7005-1(c).

3. [18-13226](#)-A-13 **IN RE: CHARLES/SHUANTA BROWN**
[TCS-2](#)

MOTION TO MODIFY PLAN
10-7-2022 [\[56\]](#)

SHUANTA BROWN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to December 15, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice 3015-1(d)(2). The Chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to modify the Chapter 13 plan. Tr.'s Opp'n, Doc. #65. Unless this case is voluntarily converted to Chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, the debtors shall file and serve a written response no later than December 1, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. Trustee shall file and serve a reply, if any, by December 8, 2022.

If the debtors elect to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than December 8, 2022. If the debtors do not timely file a modified plan or a written response, this motion will be denied on the grounds stated in Trustee's opposition without a further hearing.

4. [22-11036](#)-A-13 **IN RE: SERENA/COLE BLASINGAME**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
10-26-2022 [\[29\]](#)

BENNY BARCO/ATTY. FOR DBT.
\$76.00 INSTALLMENT FEE PAID 11/1/22

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid. The case shall remain pending.

MOTION TO DISMISS CASE
10-17-2022 [\[35\]](#)

MICHAEL MEYER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The court will issue an order.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

This motion was set for hearing on at least 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the debtor to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the default of the debtor is entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Here, the chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors. Doc #35. Specifically, the trustee asks the court to dismiss this case for the debtor's failure to: (1) appear at the continued § 341 meeting of creditors; and (2) provide the trustee with any requested documents. Doc. #35. The debtor did not oppose.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors because the debtor failed to appear at the continued 341 meeting of creditors and failed to provide trustee with all of the documentation required by 11 U.S.C. § 521(a)(3) and (4).

Because the debtor has failed to appear at the continued meeting of creditors, dismissal rather than conversion is appropriate.

Accordingly, the motion will be GRANTED, and the case dismissed.

6. [17-13050](#)-A-13 **IN RE: DWIGHT/MARISSA ROSENQUIST**
[MHM-3](#)

OBJECTION TO NOTICE OF INTENT TO ENTER DISCHARGE BY MICHAEL H. MEYER
10-19-2022 [[118](#)]

MARC VOISENAT/ATTY. FOR DBT.
WITHDRAWN

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on October 20, 2022. Doc. #126.

7. [22-11562](#)-A-13 **IN RE: FRANCISCO LOPEZ JUAREZ AND VICKIE JUAREZ**
[MHM-1](#)

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-19-2022 [[13](#)]

MICHAEL MEYER/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Overruled.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The court will issue an order after the
hearing.

This motion was set for hearing on at least 28 days' notice as required by
Local Rule of Practice ("LBR") 9014-1(f)(1). The debtors timely filed written
opposition on November 2, 2022. Doc. #21. This matter will proceed as
scheduled.

Michael H. Meyer ("Trustee"), the Chapter 13 trustee in the bankruptcy case of
Francisco Lopez Juarez and Vickie Ann Juarez (together, "Debtors"), objects to
Debtors' claim of a homestead exemption in the amount of \$300,000.00 under
California Code of Civil Procedure § 704.030 in real property located at
208 E. Country Avenue, Visalia, CA ("Property"). Tr.'s Obj., Doc. #13; see
Schedule C, Doc. #1. Debtors testified at their 341 meeting of creditors held
on October 18, 2022 that Debtors purchased the Property in December 2020. Tr.'s
Decl., Doc. #15. Because the Property was purchased in December 2020 and
Debtors filed this bankruptcy case on September 8, 2022, Debtors have not owned
the Property for more than 1215 days before filing their chapter 13 case. Tr.'s
Obj., Doc. #13. Therefore, Debtors cannot claim a homestead exemption of
\$300,000.00 and are limited to an exemption of \$189,050.00 in the Property
pursuant to 11 U.S.C. § 522(p)(1).

"[T]he debtor, as the exemption claimant, bears the burden of proof which
requires her to establish by a preponderance of the evidence that [the

property] claimed as exempt in Schedule C is exempt under California Code of Civil Procedure § [704.030] and the extent to which the exemption applies." In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015); see Diaz v. Kosmala (In re Diaz), 547 B.R. 329, 337 (B.A.P. 9th Cir. 2016) (concluding "that where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation.").

Debtors oppose the objection to exemption asserting that Debtors misunderstood the question at the 341 meeting regarding when they purchased the Property and have actually owned the Property since December 12, 2000. Decl. of Francisco Lopez Juarez, Doc. #22. A copy of the grant deed filed with the opposition shows that title to the Property transferred to Debtors on December 12, 2000. Ex. A, Doc. #23.

The court finds that the evidence provided by Debtors in support of their opposition satisfies their burden of proof that Debtors purchased the Property more than 1215 days before filing their chapter 13 case.

Accordingly, this objection is OVERRULED.

8. [20-12069](#)-A-13 **IN RE: SCOTT/SARINA DUTEY**
[TCS-7](#)

MOTION TO APPROVE LOAN MODIFICATION
10-17-2022 [[103](#)]

SARINA DUTEY/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This matter is DENIED WITHOUT PREJUDICE.

Section 4 of the certificate of service that was filed on October 17, 2022 (Doc. #107) does not list the documents that were served. Therefore, the court does not know whether all creditors and other parties in interest were properly served with notice of the motion and other supporting documents. In addition, the loan modification agreement with Freedom Mortgage Corporation was not filed as a supporting exhibit to the motion so the court is not able to review that document in its consideration of the motion.

9. [22-10777](#)-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
[TCS-3](#)

MOTION TO CONFIRM PLAN
10-12-2022 [\[76\]](#)

CONSTANCE RYAN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to December 15, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice 3015-1(d)(1). The Chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to confirm the Chapter 13 plan. Tr.'s Opp'n, Doc. #83. Unless this case is voluntarily converted to Chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, the debtors shall file and serve a written response no later than December 1, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. Trustee shall file and serve a reply, if any, by December 8, 2022.

If the debtors elect to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than December 8, 2022. If the debtors do not timely file a modified plan or a written response, this motion will be denied on the grounds stated in Trustee's opposition without a further hearing.

10. [22-11395](#)-A-13 **IN RE: GLORIA GARCIA**
[SLL-1](#)

MOTION TO CONFIRM PLAN
10-10-2022 [\[19\]](#)

GLORIA GARCIA/MV
STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to December 15, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice 3015-1(d)(1). The Chapter 13 trustee ("Trustee") filed an objection to the debtor's motion to confirm the Chapter 13 plan. Tr.'s Opp'n, Doc. #27. Unless this case is voluntarily converted to Chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, the debtor shall file and serve a written response no later than December 1, 2022. The response shall specifically address each issue raised in the objection to

confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtor's position. Trustee shall file and serve a reply, if any, by December 8, 2022.

If the debtor elects to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than December 8, 2022. If the debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in Trustee's opposition without a further hearing.

11:00 AM

1. [20-13822](#)-A-7 **IN RE: FAUSTO CAMPOS AND VERONICA NAVARRO**
[21-1006](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
5-6-2021 [\[18\]](#)

RAMIREZ V. CAMPOS
PAMELA THAKUR/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to December 15, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the Stipulation to Continue Pretrial Conference (Doc. #47), the pre-trial conference, which will be treated as a status conference, will be continued to December 15, 2022 at 11:00 a.m. The parties shall file and serve either joint or unilateral status report(s) not later than December 8, 2022.

2. [22-11042](#)-A-7 **IN RE: TIFFINI HUGHES**
[22-1019](#) [DMG-1](#)

MOTION TO STRIKE AND/OR MOTION TO DISMISS ADVERSARY
PROCEEDING/NOTICE OF REMOVAL
10-19-2022 [\[8\]](#)

LABOR COMMISSIONER OF THE STATE OF CALIFORNIA V. HUGHES
D. MAX GARDNER/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped as moot.

ORDER: The court will issue an order.

On October 19, 2022, the defendant filed a motion to strike or dismiss the adversary proceeding (DMG-1) and notice of hearing. Doc. ##8, 9. On October 20, 2022, the defendant filed a duplicate motion to strike or dismiss the adversary proceeding and notice of hearing along with a certificate of service. Doc. ##7, 10, 11. The court has deemed Doc. ##8, 9 to be duplicates of Doc. ##7, 10. Therefore, the duplicate motion and notice of hearing (Doc. ##8, 9) will be DROPPED AS MOOT.

3. [22-11042](#)-A-7 **IN RE: TIFFINI HUGHES**
[22-1019](#) [DMG-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR
MOTION TO STRIKE
10-20-2022 [7]

LABOR COMMISSIONER OF THE STATE OF CALIFORNIA V. HUGHES
D. MAX GARDNER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with leave to amend with respect to the first and
second causes of action and denied in all other respects.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The court will issue an order after the
hearing.

This motion was set for hearing on at least 28 days' notice as required by
Local Rules of Practice 9014-1(f)(1) and 9014-1(f)(2)(A). The plaintiff timely
filed written opposition on November 3, 2022. Doc. #12. The defendant timely
replied to the plaintiff's opposition on November 9, 2022. Doc. #13. This
matter will proceed as scheduled.

On September 19, 2022, plaintiff Labor Commissioner of the State of California,
Lilia Garcia-Brower ("Plaintiff"), commenced this adversary proceeding by
filing a complaint (the "Complaint"). Doc. #1.

Defendant Tiffini R. Hughes ("Defendant") moves to dismiss all claims against
her pursuant to Federal Rule of Civil Procedure ("Civil Rule") 12(b)(6) for
failure to state a claim upon which relief can be granted. Doc. #8. Civil
Rule 12(b)(6) is made applicable to this adversary proceeding by Federal Rule
of Bankruptcy Procedure ("Bankruptcy Rule") 7012(b). As set forth in
Defendant's Motion to Dismiss ("Motion"), Defendant moves on the grounds that:
(1) Plaintiff's claim as a creditor is illusory; (2) the Complaint does not
establish elements of fraudulent representation under § 523(a)(2)(A); (3) the
Complaint does not sufficiently describe actual fraud under § 523(a)(2)(A); and
(4) the Complaint does not describe willful and malicious conduct and injury.
Defendant also moves to strike Plaintiff's request for attorney's fees pursuant
to Civil Rule 12(f), made applicable to this adversary proceeding by Bankruptcy
Rule 7012(b). Doc. #8.

For the reasons set forth below, the court is inclined to grant the Motion with
leave to amend with respect to the first and second causes of action. The court
is inclined to deny the Motion with respect to the third cause of action. The
court also is inclined to deny Defendant's request to strike.

MOTION TO DISMISS

"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) (citation omitted). "In
considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a
claim for relief, the court accepts as true all material facts alleged in the
complaint and draws all reasonable inferences in favor of the plaintiff. The
motion to dismiss is granted only if no set of facts can be established to

entitle the plaintiff to relief." Enron Corp. v. Credit Suisse First Boston Int'l (In re Enron Corp.), 328 B.R. 58, 64 (Bankr. S.D.N.Y. 2005) (citations omitted).

A. Plaintiff's Claim as Creditor is Illusory

Defendant first argues that Plaintiff's claim as a creditor is illusory. Bankruptcy Rule 4007(a) provides that "any creditor may file a complaint to obtain a determination of the dischargeability of any debt." Fed. R. Bankr. P. 4007(a). Defendant contends that the Complaint should be dismissed because Plaintiff has not provided sufficient information as to what judgments have been assigned to Plaintiff.

The Complaint seeks damages in an amount of at least \$734,074.86, which is the sum of (a) two state court judgments totaling over \$530,543.37 that were filed by Plaintiff and arise from a large-scale investigation by Plaintiff into Debtor's employment practices and (b) four judgments totaling over \$203,531.49 for which Plaintiff is the assignee that arise from the claims of six employees for unpaid wages. Complaint, ¶¶ 5, 6.

For purposes of the motion to dismiss, the court accepts as true all material facts alleged in the Complaint and draws all reasonable inferences in favor of Plaintiff. Accepting as true the allegations that Plaintiff holds two judgments against Defendant and is the assignee of at least four other judgments against Defendant, the court finds that Plaintiff has adequately pled that Plaintiff is a creditor of Defendant for purposes of a motion to dismiss under Civil Rule 12(b)(6). Accordingly, the Motion is denied on this basis.

B. Causes of Action Under 11 U.S.C. § 523(a)(2)(A)

Defendant next contends that Plaintiff's causes of action to have Plaintiff's claims against Defendant determined to be non-dischargeable under 11 U.S.C. § 523(a)(2)(A) are not pled either with sufficient allegations to support such causes of action or with the requisite particularity.

The first cause of action of the Complaint seeks to have Plaintiff's claim against Defendant determined to be non-dischargeable under 11 U.S.C. § 523(a)(2)(A) based on fraudulent representation. The second cause of action seeks to have Plaintiffs' claim against Defendant determined to be non-dischargeable under 11 U.S.C. § 523(a)(2)(A) based on actual fraud.

A creditor seeking to except a debt from discharge under § 523(a)(2)(A) based on false pretenses, false representation, or actual fraud bears the burden of proving by a preponderance of the evidence five elements:

- (1) misrepresentation(s), fraudulent omission(s), or deceptive conduct;
- (2) knowledge of the falsity or deceptiveness of such representation(s), omission(s), or conduct;
- (3) an intent to deceive;
- (4) justifiable reliance by the creditor; and
- (5) damage to the creditor proximately caused by its reliance.

Cardenas v. Shannon (In re Shannon), 553 B.R. 380, 388 (B.A.P. 9th Cir. 2016) (citations omitted).

The intent to deceive requirement may be established by showing "either actual knowledge of the falsity of a statement, or reckless disregard for its truth." In re Grabau, 151 B.R. 227, 234 (N.D. Cal. 1993) (quoting In re Houtman, 568 F.2d 651, 656 (9th Cir. 1978)). Intent to deceive can be inferred from the totality of the surrounding circumstances. See Dakota Steel, Inc. v. Dakota (In re Dakota), 284 B.R. 711, 721 (Bankr. N.D. Cal. 2002) (citing to Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1282 (9th Cir.1996)). Intent to deceive also can be inferred from surrounding circumstances or inferences from a course of conduct. See Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997).

For a representation regarding future performance to be actionable under § 523(a)(2)(A), a debtor must lack an intent to perform when the promise was made. See Donaldson v. Hayes (In re Hayes), 315 B.R. 579, 587 (Bankr. C.D. Cal. 2004) (citing Anastas, 94 F.3d at 1285). A mere failure to fulfill a promise to pay a debt is not fraudulent as to render the debt non-dischargeable, absent proof that the promise was made with the intent not to pay or knowing that payment would be impossible. See Citibank (S.D.) N.A. v. Lee (In re Lee), 186 B.R. 695, 699 (B.A.P. 9th Cir. 1995).

With respect to causes of action relating to fraud, Civil Rule 9(b), incorporated into this adversary proceeding by Bankruptcy Rule 7009, requires a party to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). However, "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Id.

In the Ninth Circuit, "in order for a complaint to allege fraud with the requisite particularity [of Civil Rule 9(b)], a plaintiff must set forth more than the neutral facts necessary to identify the transaction." Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (internal quotations and citation omitted). Civil Rule 9(b) requires that when allegations of fraud are made "the circumstances constituting the alleged fraud" must be "'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations omitted). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged. '[A] plaintiff must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false.'" Id. (emphasis in original) (citation omitted).

1. First Cause of Action for False Representation

Here, Plaintiff alleges in paragraphs 24 and 25 of the Complaint that Defendant in her individual capacity and/or as the owner of certain entities, which Plaintiff asserts were either sole proprietorships or alter egos of Defendant's sole proprietorship, obtained services from at least 26 employees by promising to pay contractual wages to these employees but did not pay such wages when due and continued to engage the employees' services by promising to catch up on those payments and/or by stating that Defendant would eventually receive enough funds to pay the employees. These allegations do not (a) state to which employees Defendant made these alleged representations, (b) specify what representations were made to each employee, (c) state in what capacity Defendant was acting, and (d) state when and where these representations were made.

In paragraph 9 of the Complaint, Plaintiff alleges Defendant continually failed to pay employees their final paychecks or all wages earned by promising "to mail final paychecks after separation and told employees to hold onto their

paychecks for several days before cashing them" but the paychecks never arrived or bounced when employees tried to cash them. Complaint, ¶ 9. Again, these allegations do not state to which employees Defendant made these alleged representations and in what capacity Defendant was acting as well as when and where these representations were made.

Accordingly, the court determines that the Complaint does not adequately set forth factual allegations with the particularity required by Civil Rule 9(b) to state a claim for non-dischargeability under 11 U.S.C. § 523(a)(2)(A) for false representation. Because it appears Plaintiff could plead facts with the requisite particularity that could support this relief and relate back to the claims pled in the Complaint, the Motion is granted with leave to amend as to the first cause of action.

2. Second Cause of Action for Actual Fraud

With respect to the cause of action under 11 U.S.C. § 523(a)(2)(A) for actual fraud, Plaintiff alleges in paragraphs 33 through 39 of the Complaint that Defendant obtained services from her employees by actual fraud when Defendant transferred assets such as monies, account receivables, vendor accounts, client lists and goodwill from Mulberry 123, LLC to Ever Dawn Foundation, an entity over which Defendant retains control. Plaintiff alleges that these conveyances were not made for reasonable equivalent value and were made in secret. Complaint, ¶¶ 33-34. Plaintiff alleges that Defendant's transfer of the assets of Mulberry 123, LLC to Ever Dawn Foundation left Mulberry 123, LLC unable to pay its debts, including those owed to former employees for wages. Complaint, ¶ 38. Plaintiff further alleges that Defendant damaged former employees and Plaintiff by engaging in these fraudulent transfers because Defendant deprived Plaintiff and Defendant's former employees of the ability and opportunity to collect unpaid wage debt directly from Mulberry 123, LLC. Complaint, ¶ 41. Plaintiff alleges that Defendant intended to hinder, delay, or defraud creditors of Mulberry 123, LLC by making these transfers and created a web of entities to absorb debts and hide assets. Complaint, ¶ 39.

While Plaintiff infers in her opposition that her allegations with respect to her second cause of action do not need to meet the pleading requirements of Civil Rule 9(b), the court disagrees. "Claims of avoidance and recovery of an actual fraudulent transfer are subject to the heightened pleading standards of [Civil] Rule 9(b)." Screen Capital Int'l Corp. v. Library Asset Acquisition Co. (In re R2D2, LLC), 510 B.R. 248, 257 (C.D. Cal. 2014). In Screen Capital, the plaintiff pled a cause of action to avoid an actual fraudulent transfer but failed to specifically allege what rights in a film library were transferred, when each transfer occurred for the benefit of the fraudulent transfer defendant, and thus what each of the debtors was seeking to recover. The district court held that the plaintiff failed to plead allegations of fraud with particularity by failing to include sufficient facts regarding the underlying fraudulent transfer. Screen Capital, 510 B.R. at 257.

Likewise, in Seror v. Stone (In re Automated Fin. Corp.), No. 1:08-BK-14339-MT, 2011 Bankr. LEXIS 291, 2011 WL 10502417, at *4 (Bankr. C.D. Cal. Jan. 25, 2011), the bankruptcy court held that the trustee did not meet the pleadings standard under Civil Rule 9(b) with respect to fraudulent transfers under 11 U.S.C. § 548(a)(1)(A) when the complaint alleged that the debtors and/or their principals were engaged in a Ponzi scheme, but the trustee had not pled any facts that tied together the actual intent to defraud with the specifics of transfers being attacked.

Based on Screen Capital and Seror, the court determines that allegations supporting a claim under § 523(a)(2)(A) based on actual fraudulent transfer

must satisfy the particularity requirement of Civil Rule 9(b), which Plaintiff has failed to do. For example, Plaintiff has failed to plead with particularity when the various assets were transferred from Mulberry 123, LLC to Ever Dawn Foundation. Plaintiff also has failed to plead with particularity facts that tie together Defendant's actual intent to defraud Plaintiff and her former employees when the assets of Mulberry 123, LLC were transferred to Ever Dawn Foundation. Further, the Complaint does not allege with particularity facts to form the basis for a finding that these transfers actually hindered, delayed or defrauded Plaintiff or Plaintiff's assignors or that Defendant intended the transfers to hinder, delay, or defraud Plaintiff or Plaintiff's assignors.

Although the Complaint does not adequately set forth factual allegations with the requisite particularity to state a claim for non-dischargeability under 11 U.S.C. § 523(a)(2)(A) for actual fraud, it appears that Plaintiff could plead facts with the requisite particularity that could support this relief. Accordingly, the Motion is granted with leave to amend as to the second cause of action.

In her opposition, Plaintiff requests that any leave to amend with respect to the second cause of action "also permit [Plaintiff] to plead additional theories of recovery." Opp'n at 8:18 - 9:1. The court is not granting Plaintiff leave to plead additional theories of recovery. In her reply, Defendant "submits that the Plaintiff is limited to the claims for relief brought prior to the expiration of the 60-day time limit" under Bankruptcy Rule 4007. To the extent Plaintiff seeks to plead additional theories of recovery in an amended complaint that would not relate back under Civil Rule 15(c)(1)(B), made applicable to this adversary proceeding by Bankruptcy Rule 7015, to the claims set forth in the Complaint, such claims may be barred under Bankruptcy Rule 4007.

In Defendant's reply to the opposition to the Motion, Defendant also asks this court to rely upon an admission made in Plaintiff's opposition concerning a settlement of Plaintiff's pre-petition fraudulent conveyance suit against Defendant and others wherein the properties subject to the Complaint were in fact conveyed back and Plaintiff received payment. Doc. #13. "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Civil Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Civil Rule 12(d). If this court were to rely on a statement in Plaintiff's opposition in considering this Motion, that reliance would change this Motion from a motion to dismiss to a motion for summary judgment, which this court is not going to do.

C. Cause of Action Under 11 U.S.C. § 523(a)(6)

Defendant next contends that the Complaint does not state sufficient allegations to support a cause of action to have Plaintiff's claim against Defendant determined to be non-dischargeable under 11 U.S.C. § 523(a)(6).

A creditor seeking to except a debt from discharge under § 523(a)(6) must prove both willfulness and malice. Hamilton v. Elite of Los Angeles, Inc. (In re Hamilton), 584 B.R. 310, 319 (B.A.P. 9th Cir. 2018). "A 'willful' injury is a 'deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). Under Ninth Circuit authority, the willful injury requirement under § 523(a)(6) "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." Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010); Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Under Ninth Circuit authority, "[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." Ormsby, 591 F.3d at 1206.

Here, Plaintiff alleges in paragraphs 46 and 47 of the Complaint that Defendant acted willfully and maliciously when receiving payment from clients for work her employees performed but did not affect payment to those employees. Further, Plaintiff alleges in paragraph 47 of the Complaint that Defendant and her closely held entities retained funds received for their employee's services and undercapitalized bank accounts from which their employees' wages were to be drawn from and allowed checks from these accounts to bounce, and ultimately closed these accounts with debts for wages outstanding. Further, Plaintiff alleges in paragraph 48 of the Complaint that Defendant abandoned several entities that gave rise to Defendant's employment of her employees, but continued her operation elsewhere, thereby depriving employees of their opportunity to collect wages against those entities. Plaintiff alleges in paragraph 49 of the Complaint that Defendant's refusal and active interference in the payment of those wages, in spite of her ability to do so, was willful and malicious.

In Jercich, the court held that a debtor inflicted willful and malicious injury to an employee when the debtor knew he owed wages to an employee and that injury to an employee was substantially certain to occur if the wages were not paid; and that debtor had the clear ability to pay employee their wages, yet chose not to pay and instead used the money for his own personal benefit and debtor had pointed to no just cause or excuse for his behavior. Jercich, 238 F.3d at 1209. In a similar fashion, Plaintiff alleges in the Complaint that Defendant inflicted willful and malicious injury on former employees by failing to pay wages when receiving payments for her employees' work and services, abandoning several entities that gave rise to Defendant's employment of her employees, undercapitalizing bank accounts from which wages were to be paid, and refusing and actively interfering in the payment of wages, despite her ability to do so.

The court finds that the Complaint adequately sets forth sufficient factual allegations to have Plaintiffs' claim against Defendant determined to be non-dischargeable under 11 U.S.C. § 523(a)(6). Accordingly, the Motion is denied as to the third cause of action.

MOTION TO STRIKE

Finally, without providing any legal authority, Defendant requests the court strike Plaintiff's request for attorneys' fees pursuant to California Labor Code § 98.2(k) because California Labor Code § 98.2(k) does not pertain to a bankruptcy court judgment. California Labor Code § 98.2(k) provides: "The judgment creditor, or the Labor Commissioner as assignee of the judgment creditor, is entitled to court costs and reasonable attorney's fees for enforcing the judgment that is rendered pursuant to this section." Cal. Lab. Code § 98.2(k).

Civil Rule 12(f), made applicable to this adversary proceeding by Bankruptcy Rule 7012(b), governs motions to strike. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Civil Rule 12(f). A motion to strike functions to streamline litigation by dispensing with "spurious issues," but "courts freely

grant leave to amend stricken pleadings.” Kohler v. Staples the Office Superstore, LLC, 291 F.R.D. 464, 467 (S.D. Cal. 2013).

Defendant has provided no analysis as to why Plaintiff’s request for attorney’s fees is redundant, immaterial, impertinent or scandalous and subject to being stricken under Civil Rule 12(f). To the extent Defendant is asserting that Plaintiff’s request for attorney’s fees pursuant to California Labor Code § 98.2(k) cannot not apply in bankruptcy court, the court questions this assertion. In an analogous situation, a bankruptcy court found that successful prosecution of a judgment to deny a discharge was enforcement of a judgment for purposes of California Code of Civil Procedure § 685.040¹ and permitted the plaintiff’s counsel to recover attorney’s fees incurred in the discharge litigation. Phillips v. Gilman (In re Gilman), 603 B.R. 437, 440 (B.A.P. 9th Cir. 2019).

Defendant has not presented sufficient legal authority and analysis to strike Plaintiff’s request for attorney’s fees. Accordingly, the Motion is denied as with respect to the motion to strike.

CONCLUSION

For the reasons set forth above, the Motion is GRANTED with leave to amend with respect to the first and second cause of action and DENIED in all other respects.

4. [19-13871](#)-A-7 **IN RE: JENNA LONG**
[22-1009](#)

MOTION TO DISMISS NELNET
10-19-2022 [\[29\]](#)

LONG V. U.S. DEPARTMENT OF EDUCATION ET AL
JONATHAN SANDLER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with leave to amend.

ORDER: The minutes of the hearing will be the court’s findings and conclusions. The court will issue an order after the hearing.

This motion was set for hearing on at least 28 days’ notice as required by Local Rules of Practice 9014-1(f)(1) and 9014-1(f)(2)(A). The plaintiff timely filed written opposition on November 3, 2022. Doc. #35. The defendant timely replied to the plaintiff’s opposition on November 10, 2022. Doc. #36. This matter will proceed as scheduled.

On March 30, 2022, plaintiff Jenna Long (“Plaintiff”) commenced this adversary proceeding. Doc. #1. On June 2, 2022, Plaintiff filed her First Amended Complaint (the “Complaint”). Doc. #11.

¹ Under California Code of Civil Procedure § 685.040, a judgment creditor is “entitled to the reasonable and necessary cost of enforcing a judgment,” including, in some situations, attorneys’ fees. Cal. Code Civ. Proc. § 685.040.

Defendant Nelnet Servicing, LLC ("Nelnet") moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure ("Civil Rule") 12(b)(6) for failure to state a claim upon which relief can be granted or, alternatively, drop Nelnet from the adversary proceeding with prejudice pursuant to Civil Rule 21. Doc. #29. Civil Rule 12(b) is made applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7012(b). Civil Rule 21 is made applicable to this adversary proceeding pursuant to Bankruptcy Rule 7021. For the reasons set forth below, the court is inclined to grant the Motion to dismiss Nelnet with leave to amend.

Nelnet first argues that the Complaint fails to state a claim for relief against Nelnet and should be dismissed under Civil Rule 12(b)(6). "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) (citation omitted). "In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim for relief, the court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. The motion to dismiss is granted only if no set of facts can be established to entitle the plaintiff to relief." Enron Corp. v. Credit Suisse First Boston Int'l (In re Enron Corp.), 328 B.R. 58, 64 (Bankr. S.D.N.Y. 2005) (citations omitted).

The only cause of action asserted in the Complaint is a cause of action under 11 U.S.C. § 523(a)(8). Student loan obligations are presumed to be non-dischargeable absent a showing by the debtor of undue hardship. 11 U.S.C. § 523(a)(8); Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001). The Complaint alleges that Nelnet is the servicer of Plaintiff's federal student loans at issue in the Complaint. Complaint, ¶¶ 18, 19. There is no allegation that Nelnet is the holder of the student loan debt that Plaintiff seeks to have determined to be discharged, and Plaintiff has not provided any legal authority for including the loan servicer in a cause of action under 11 U.S.C. § 523(a)(8) for determination that a student loan debt is dischargeable.

To the extent Plaintiff seeks to hold Nelnet accountable for continuing to list a discharged obligation on Plaintiff's credit, such a cause of action would arise as a violation of the discharge injunction, not under 11 U.S.C. § 523(a)(8). The court will grant leave to amend to permit Plaintiff to plead such a cause of action against Nelnet if such a cause of action exists.

Nelnet next contends that if the court does not dismiss Nelnet under Civil Rule 12, Nelnet should be dropped as a party from this adversary proceeding under Civil Rule 21. Civil Rule 21 provides that "the court may at any time, on just terms, add or drop a party." Mendoza v. Nordstrom, Inc., 865 F.3d 1261, 1266 (9th Cir. 2017). However, because the court is granting the motion to dismiss with leave to amend, the Motion is denied under this alternative relief.

For the reasons set forth above, the Motion is GRANTED with leave to amend. Plaintiff shall file and serve an amended complaint on or before December 8, 2022. If an amended complaint is not filed and served by that date, then Nelnet will be dismissed as a defendant in this adversary proceeding.

5. [19-13871](#)-A-7 **IN RE: JENNA LONG**
[22-1009](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
6-2-2022 [[11](#)]

LONG V. U.S. DEPARTMENT OF EDUCATION ET AL
NANCY KLEPAC/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.