

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
2500 Tulare Street, 5<sup>th</sup> Floor  
Courtroom 11, Department A  
Fresno, California

**PRE-HEARING DISPOSITIONS**

**DAY:** WEDNESDAY

**DATE:** DECEMBER 18, 2019

**CALENDAR:** 3:30 P.M. CHAPTERS 13 AND 12 ADVERSARY PROCEEDINGS

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. 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.

1. [19-12679](#)-A-13     **IN RE: NAEEM/SAIMA QARNI**  
[19-1090](#)

CONTINUED STATUS CONFERENCE RE: FIRST AMENDED COMPLAINT  
10-16-2019    [[66](#)]

QARNI ET AL V. VAHORA ET AL  
NICHOLAS ANIOTZBEHERE/ATTY. FOR PL.

### **Final Ruling**

The status conference is continued to January 8, 2020, at 3:30 p.m.

2. [19-12679](#)-A-13     **IN RE: NAEEM/SAIMA QARNI**  
[19-1104](#)

STATUS CONFERENCE RE: COMPLAINT  
10-3-2019    [[1](#)]

VAHORA, M.D., PH.D. V. QARNI  
PAUL GAUS/ATTY. FOR PL.

### **No Ruling**

3. [19-12679](#)-A-13     **IN RE: NAEEM/SAIMA QARNI**  
[19-1104](#)     [NEA-1](#)

MOTION TO DISMISS CASE  
11-1-2019    [[8](#)]

VAHORA, M.D., PH.D. V. QARNI  
NICHOLAS ANIOTZBEHERE/ATTY. FOR MV.  
RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Dismiss Complaint in Adversary Proceeding

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted without leave to amend

**Order:** Civil minute order

Naeem Qarni moves to dismiss the § 523(a)(6) (willful and malicious conduct) count of an adversary proceeding against him.

### **FACTS**

Naeem Qarni ("Naeem") and his spouse, Saima Qarni (collectively "Qarnis") are chapter 13 debtors. Qarnis have proposed a proposed but not confirmed a plan.

Gulamnabi Vahora ("Vahora") is a creditor in the Qarnis' bankruptcy. Prior to the Qarni Chapter 13 bankruptcy, Vahora obtained a \$240,000 judgment against Naeem arising out of their involvement in Valley Diagnostics Laboratory.

Vahora has filed a complaint to except this debt from discharge under 11 U.S.C. § 523(a)(2),(4),(6). In response, Naeem moves to dismiss the complaint under Rule 12(b)(6). His primary argument is that unless and until he seeks a hardship discharge under 11 U.S.C. § 1328(b) Vahora has not stated a claim from which relief may be granted.<sup>1</sup>

## **LAW**

### 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). "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." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider 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

---

<sup>1</sup> Naeem also argues that the complaint must be dismissed because the Adversary Proceeding Cover Sheet, Form B1040, was blank. Fed. R. Civ. P. 41(b). This court disagrees.

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).

#### Section 523(a)(6) and the Chapter 13 Discharge

Title 11 of the United States Code § 523(a)(6) excepts from discharge debts for certain purposeful injuries:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from **any debt—**

....

**(6) for willful and malicious injury by the debtor to another entity or to the property of another entity...**

11 U.S.C. § 523(a)(6) (emphasis added).

As applied to chapter 13 discharge works differently depending on whether the discharge was in full or under a hardship. Full discharge is governed by § 1328(a), which provides:

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, **except any debt--**

. . .

**(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)...**

11 U.S.C. § 1328(a) (emphasis added and omitting § 523(a)(6)).

Sometimes, debtors who have not fully completed their chapter 13 plan still receive a discharge. 11 U.S.C. § 1328(b). When a debtor

receives such a hardship discharge the scope of the discharge is more restricted and is governed by § 1328(c), which provides:

A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, **except any debt--**

(1) provided for under section 1322(b)(5) of this title;  
or

**(2) of a kind specified in section 523(a) of this title.**

11 U.S.C.A. § 1328(c) (emphasis added).

## DISCUSSION

### Failure to State a Cause of Action

A debt under § 523(a)(6) is nondischargeable in a chapter 13 case only when the debtor has been granted a hardship discharge under § 1328(b). Compare 11 U.S.C. § 1328(c)(2) (listing the types of § 523(a) debts that are not discharged under a § 1328(b) hardship discharge), with *id.* § 1328(a)(2) (listing the types of § 523(a) debts that are not discharged under a § 1328(a) standard discharge). If the debtor obtains a standard discharge under § 1328(a), a debt that is somewhat similar to a debt described in § 523(a)(6) is excepted from the discharge. See § 1328(a)(4).

The Federal Rules of Bankruptcy Procedure accommodate this statutory distinction between the standard discharge and the hardship discharge. The deadline for filing a nondischargeability complaint under § 523(c), i.e., debts under § 523(a)(2), (a)(4), and (a)(6), is established in Rule 4007. The rule provides that a complaint to determine the dischargeability of a debt under § 523(c) must be filed no later than 60 days after the first date set for the § 341(a) meeting of creditors "[e]xcept as otherwise provided in subdivision (d)." Fed. R. Bankr. P. 4007(c) (emphasis added). The exception "otherwise provided in subdivision (d)" applies only to a § 523(a)(6) claim brought against a chapter 13 debtor. Rule 4007(d) states, "On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6)." Fed. R. Bankr. P. 4007(d).

Until a hardship discharge is sought, a § 523(a)(6) claim "is not ripe for decision because 'resolution of the issue has no meaningful effect until and unless the debtor moves for hardship discharge, a contingency that occurs only in a small percentage of Chapter 13 cases.'" *Auto. Fin. Corp. v. Smith (In re Smith)*, 2009 WL 4800159, at \*2 (Bankr. E.D.N.C. Dec. 8, 2009) (quoting *Ambassadors Travel Servs., Inc. v. Liescheidt (In re Liescheidt)*, 404 B.R. 499, 505 (Bankr. C.D. Ill. 2009)). Since the Debtor has not moved for a hardship discharge yet, it is inappropriate for the court to adjudicate Davis's first claim for relief at this time.

Therefore, the claim under § 523(a)(6) must be dismissed at this time, without prejudice.

#### Leave to Amend

As this court has previously stated,

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." In determining whether to grant leave to amend the court should consider five factors: bad faith, undue delay, prejudice, futility, and previous amendments. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). "Futility alone can justify" denying leave to amend. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004).

*In re Jorgensen*, No. 18-14586-A-13, 2019 WL 6720418, at \*9 (Bankr. E.D. Cal. Dec. 10, 2019)

Unless and until the Qarnis seek a hardship discharge under 11 U.S.C. § 1328(b) or converts the case to chapter 7, Vahora has not, and cannot, state a claim upon which relief can be granted. Leave to amend is denied.

#### **CIVIL MINUTE ORDER**

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

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Naeem Qarni's Rule 12(b)(6) motion to dismiss has been presented to the court. Having considered the complaint, the motion, the memorandum of points and authorities, and the opposition,

IT IS ORDERED that the motion to dismiss is granted as to the third count (11 U.S.C. § 523(a)(6) and is otherwise denied;

IT IS FURTHER ORDERED that leave to amend is denied, unless and until defendant Naeem Qarni seeks a hardship discharge under 11 U.S.C. § 1328(b) or the case is converted to chapter 7;

IT IS FURTHER ORDERED that the defendant Naeem Qarni shall file and answer to the first and second counts of the complaint not later than January 8, 2020. The parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.

IT IS FURTHER ORDERED that if defendant fails to file timely a responsive pleading or motion, the plaintiff shall seek entry of the defendant Naeem Qarni's default.