UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Saeed Cohen Debtor(s).	CHAPTER 11 Case No.: 2:13-bk-26483-NB Adv No: 2:16-ap-01046-NB **MEMORANDUM DECISION GRANTING DEFENDANT SAEED COHEN'S MOTION TO DISMISS** Hearings: Date: April 5, 2016 Time: 2:00 PM Date: May 16, 2016 Time: 10:00 a.m. Courtroom: 1545
Fariba Cohen Plaintiff(s), v. Saeed Cohen Defendant(s).	

The plaintiff, Ms. Fariba Cohen, apparently believes that the debtor has assets that were not disclosed in their divorce proceedings or in this bankruptcy case. Despite years of opportunities for discovery, she has failed to point to any actual evidence of significant nondisclosure.

Moreover, the confirmed chapter 11 plan specifically contemplates that if there were any nondisclosed assets then they would become part of the property available for distribution. In view of those provisions of the plan, Ms. Cohen has not shown any plausible basis on which any nondisclosure could have played a role in procuring confirmation of the plan by fraud. In addition, any revocation of the order confirming the plan would only harm all parties in interest by taking away the existing mechanism to administer any previously undisclosed assets.

Ms. Cohen's arguments on many of these issues are frivolous. Her complaint appears to have been filed solely as a means to increase the litigation expense and delay to her adversaries, out of spite and in an attempt to coerce more favorable treatment than that to which she previously agreed.

Ms. Cohen has not suggested any way that her complaint could be further amended to cure these defects. Accordingly, her complaint will be dismissed without leave to amend.

I. BACKGROUND[1]

A. After Years Of Incredibly Expensive Litigation The Parties Reached A Settlement, Embodied In A Confirmed Chapter 11 Plan

On June 25, 2013, the debtor filed his voluntary chapter 11 petition. The preceding years of litigation with Ms. Cohen in State courts had cost more than $11,000,000 (perhaps as much as $15,000,000 or more). *See* adv. dkt. 27, p. 2:18-21.

[1] For brevity, documents are principally referred to by their docket number ("case dkt." for the main case and "adv. dkt." for the adversary proceeding). Unless the context suggests otherwise, references to a "chapter" or "section" ("§") refer to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means one of the Federal Rules of Bankruptcy Procedure ("FRBP"), Federal Rules of Civil Procedure ("FRCP"), or other federal or local rule, and other terms have the meanings provided in the Code, the Rules, and the parties' briefs.

Unfortunately, that litigation has continued throughout this case, which now has more than 1,200 docket entries. Third party creditors have had to wait years for payment.

Nearly two years after this case was commenced, on May 14, 2015, the debtor and the Official Committee of Creditors Holding Unsecured Claims (the "Committee") filed their fourth amended joint plan of reorganization (case dkt. 990) ("Plan") and related disclosure statement (case dkt. 991). The Plan contains two options for treatment of Ms. Cohen's interests – so called "Option One" and "Option Two."

Option One embodies a proposed settlement. Option Two essentially would have allowed Ms. Cohen to continue her litigation unabated – with both the potential benefits to her if she won and the potential detriments to her if she lost – and meanwhile it provided for certain interim post-confirmation distributions to Ms. Cohen and others.

On May 15, 2015, this Court issued its order approving the joint disclosure statement (case dkt. 1003). On July 10, 2015, this Court issued a tentative ruling on plan confirmation and other related issues (case dkt. 1074) ("Original Confirmation Ruling"), and after numerous hearings later than month this Court adopted the Original Confirmation Ruling, and orally confirmed the Plan under Option Two over Ms. Cohen's objection (*see* case dkt. 1109).

Thereafter, however, Ms. Cohen asked the debtor and the Committee to let her make an untimely acceptance of Option One. As this Court stated in its findings of fact and conclusions of law in support of confirmation:

> With the consent of the Plan Proponents, the Court has authorized Fariba Cohen to accept Option One under the Plan (as modified in the manner set forth herein and in the Plan Confirmation Order). As stated on the record at the third confirmation hearing held on July 20, 2015 (the "Third Confirmation Hearing"), Fariba Cohen has withdrawn her objection to the Plan with prejudice, has accepted Option One under the Plan (as modified in the manner set forth herein and in the Plan Confirmation Order), and has permanently waived any right to appeal or seek any reconsideration or alteration of the Plan Confirmation Order. [Case dkt. 1109, p. 3, para. G, emphasis added].

On July 31, 2015, this Court entered its order confirming the Plan ("Plan Confirmation Order") (case dkt. 1110). That order bound the parties to their settlement

in Option One. For nearly half a year Ms. Cohen focused on implementation of the confirmed Plan, asserting various alleged concerns about such issues as the wording of the documents to be filed with the divorce court. Then she changed her tactics.

B. Ms. Cohen Now Seeks To Revoke Confirmation

One hundred and seventy nine days after entry of the Confirmation Order, on January 26, 2016, Ms. Cohen commenced this adversary proceeding under Section 1144. That statute provides that on request of a party in interest at any time before 180 days after entry of a confirmation order, the court "may revoke such order if and only if such order was procured by fraud."

On February 19, 2016, Ms. Cohen filed a first amended complaint (adv. dkt. 9, the "FAC"). On March 4, 2016, the debtor brought this motion to dismiss the FAC (adv. dkt. 11), and the parties have filed numerous related papers which this Court has reviewed (*e.g.,* adv. dkt. 15, 17, 20, 21, 22, 24, 25, 27, 28, 31, 32, 35).

The FAC alleges that "[d]uring Thanksgiving weekend of 2015, Plaintiff found some of Defendant's financial documents under the seat in a family car [and] [t]hose documents revealed assets that were not listed in the Schedules or [Statement Of Financial Affairs or("SOFA")] or disclosed in the Disclosure Statement." Adv. dkt. 9, p. 3 para. 13. The allegedly undisclosed assets are enumerated in the FAC in paragraphs labelled A through R. *Id.,* p. 5 ¶ 22 – p. 19 ¶ 99. Ms. Cohen further alleges that she:

> agreed to the Plan on July 20, 2015 without knowledge of the falsity of [the debtor's] disclosures and <u>without the ability to do any formal discovery</u>. Had [she] known of the falsity she would not have agreed to the Plan. As set forth below, [the debtor] engaged in fraud to obtain [Ms. Cohen's], the [] Committee's …, and other creditors' support of the Plan and to get this Court to confirm the Plan. [Adv. dkt. 9, p. 4 ¶ 14, emphasis added.]

Ms. Cohen's assertion that she was "without the ability to do any formal discovery" is somewhat confusing, coming after more than two years in this case in which she was free to conduct formal discovery, on top of additional years before that in the divorce proceedings. What she apparently means is that, in the two months between her alleged discovery of new documents under the seat of her car and the

commencement of this adversary proceeding, she had insufficient additional time for formal discovery, such as examinations under Rule 2004, based on whatever new information she allegedly found.

II. JURISDICTION, AUTHORITY, AND VENUE

This court is satisfied that venue is proper and that it has the jurisdiction and authority to issue final findings of fact and conclusions of law on the issues addressed in this memorandum decision, under the analysis set forth in the so called Issue 1 Decision (case dkt. 692 at 5:23-12:8). Specifically: (1) revocation of a plan under Section 1144 is a "core" matter both under the applicable statute (28 U.S.C. § 157(b)(2)(A), (L) & (O)) and under the U.S. Constitution because it "stem[s] from the bankruptcy itself" (*id.*, quoting Supreme Court authority); (2) alternatively, this Court has authority to issue a final ruling on the motion to dismiss because it is a pretrial motion for which no factual findings are required (*id.*); and (3) alternatively, Ms. Cohen consented to this Court's authority to issue final orders regarding confirmation, both explicitly on the record at the confirmation hearing and implicitly by proceeding all the way through confirmation of the consensual Option One version of the Plan without objecting to this Court's authority. *See also Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); *In re AWTR Liquidation Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016).

III. LEGAL STANDARDS

A. Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by Rule 12(b)(6) (incorporated by Rule 7012(b)). Rule 8(a)(2) (incorporated by Rule 7008), requires the plaintiff to provide a "short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal quotation marks omitted). The standards under these rules are well known to the parties, and need only be summarized here. *See generally* adv. dkt. 11, pp. 5:27–8:2; adv. dkt. 21, p. 3:21–27.

Credibility determinations play no role on a motion to dismiss (as with other dispositive motions). *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Therefore, for purposes of the motion to dismiss, this Court has not considered any of the statements related to credibility of any party. *See, e.g.*, adv. dkt. 11, p. 1:17 (The allegations in the Complaint are … farfetched lies and misrepresentations[.]"); adv. dkt. 25, p. 2:16–17 (referring to Ms. Cohen as "delusional").

Nevertheless, "[t]o 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 *Twombly*, 550 U.S. 544, 570) (emphasis added). "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." *Iqbal*, 556 U.S. 662, 678 (citation omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. 544, 546. "Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *In re JMC Telecom, LLC*, 416 B.R. 738, 742 (C.D. Cal. 2009) (citation omitted).

Stated otherwise, a motion to dismiss "under Rule 12(b)(6) challenges the legal sufficiency of a complaint, considered with the assumption that the facts alleged are true." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (emphasis added, citations omitted). Thus, "dismissal for failure to state a claim is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a

cognizable legal theory." *Shroyer v. New Cingular Wireless Servs.*, Inc., 622 F.3d 1035, 1041 (9th Cir. 2010) (citation omitted).

The Ninth Circuit has recently summarized this standard:

> In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual content," and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief. [*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citation omitted, emphasis added)].

This Court need not accept as true allegations that contradict facts which may be judicially noticed. Nor must this Court "accept as true allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

Rule 9(b) (incorporated by Rule 7009), adds an additional requirement that when pleading fraud "a party must state with particularity the circumstances constituting fraud." This requirement applies to claims of fraud under Section 1144. *In re Bennington*, 519 B.R. 545, 548 (Bankr. D. Utah 2014).

Rule 9(b) requires that the "circumstances constituting the alleged fraud 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) (citation and internal quotation marks omitted). The rule is satisfied if the complaint identifies the "who, what, when, where, and how" of the alleged misconduct. *Id.* (same).

B. Standards for Revocation of A Confirmation Order

Section 1144 "provides the sole basis for overturning confirmation of a chapter 11 plan." 8 *Collier on Bankruptcy* ¶ 1144.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("*Collier*"). Section 1144 provides in its entirety:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall--
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of

> confirmation; and
> (2) revoke the discharge of the debtor. [Emphasis added.]

The Ninth Circuit has explained that "[i]n recognition of the strength of the interest in finality of reorganization plans, courts have held uniformly that strict compliance with section 1144 is a prerequisite to relief." *In re Orange Tree Associates, Ltd.*, 961 F.2d 1445, 1447 (9th Cir. 1992). As the *Collier* treatise explains, this requires a causal connection between the fraud and the entry of the order confirming a chapter 11 plan:

> In order for a court to revoke an order of confirmation, the court must specifically find that the order confirming the plan was procured by fraud. It is not sufficient for the court to find that some fraud was committed in connection with the case. [8 Collier ¶ 1144.03; *see also In re V & M Mgmt., Inc.*, 215 B.R. 895, 903 (Bankr. D. Mass. 1997))("Therefore, in § 1144, 'procured' is a requirement of substantial causation, requiring a showing that the alleged fraud was instrumental in obtaining the confirmation order and made a difference in the process." (emphasis added))].

The elements of fraud under Section 1144, based on nondisclosure, are as follows:

> (1) an intentional omission;
> (2) by a party with a duty to disclose;
> (3) of facts that would be material to finding the party complied with § 1129;
> (4) that were withheld so that the court would find the party complied with § 1129;
> (5) and that as a consequence of such non-disclosure, the court entered the confirmation order. [*Tenn-Fla Partners v. First Union Nat. Bank of Florida*, 229 B.R. 720, 731 (W.D. Tenn. 1999), *aff'd*, 226 F.3d 746 (6th Cir. 2000). *See also In re V & M Mgmt., Inc.*, 215 B.R. 895, 903 (Bankr. D. Mass. 1997)].

Relief under Section 1144 is discretionary:

> The importance of the auxiliary verb "may" is that the decision of whether to revoke a confirmation order rests in the sound discretion of the court. Significantly, the court may decline to revoke the order of confirmation even if it finds that the order was procured by fraud. [*In re Delta Air Lines, Inc.*, 386 B.R. 518, 532 (Bankr. S.D.N.Y. 2008); *see In re Trico Marine Servs.*, 343 B.R. 68, 74 (Bankr. S.D.N.Y. 2006) (dismissing an adversary proceeding under 11 U.S.C. § 1144 because "even if [the plaintiff] Salsberg could prove fraud, the Court could not fashion a remedy that would satisfy the requirements of § 1144."); *In re Ogden Modulars*, 180 B.R. 544, 547 (Bankr. D. Mo. 1995) ("Section 1144 does not mandate revocation of the order of confirmation after a finding of fraud in the procurement.")].

IV. DISCUSSION

A. Initial Matters

1. The Committee has standing

On April 4, 2016, Ms. Cohen filed an objection to the Committee's response, asserting that, since the Committee is not a party to this action, it does not have standing to join in the motion to dismiss. Dkt. 36. This Court disagrees.

The Committee was a co-proponent of the Plan and, as argued on the record, it is a necessary party. Indeed, Ms. Cohen has not argued to the contrary. True, the better practice might have been to seek official joinder of the Committee, but that makes no practical difference. This Court can and does *sua sponte* grant permissive intervention under Section 1109(b) and Rule 2018(a). There is no reason to deny or delay such intervention: Ms. Cohen has had ample opportunity to respond to the Committee's arguments, and in addition she is estopped to rely on her own failure to name the Committee as a necessary defendant in order to assert that it lacks standing. Accordingly, this Court considers the Committee's written and oral arguments (*e.g.,* adv. dkt. 25). Alternatively, this Court would reach the same conclusion even if the Committee's arguments were disregarded.

2. This Court assumes for the sake of discussion that Ms. Cohen's waiver of any right to seek reconsideration is ineffective

As a predicate for confirming the Plan under Option One, Ms. Cohen agreed "as set forth on the record of the Court at the Final Confirmation Hearing to permanently waive any right to appeal or seek any reconsideration or alteration of this Confirmation Order." Case dkt. 1110, p. 2:6–8. The debtor argues that the FAC violates this provision of the Plan Confirmation Order (dkt. 11, p. 34:4–14). Ms. Cohen does not address this argument in her opposition papers (adv. dkt. 21) but this Court assumes for the sake of this discussion that if Ms. Cohen could sufficiently allege fraud in procuring the Plan Confirmation Order then she also could show fraud in procuring her above-referenced agreement not to seek reconsideration, or some equivalent basis not to be

bound by her commitment.

3. Ms. Cohen is not entitled to even more time, beyond the multiple years she has already had, in which to attempt to uncover alleged fraud

Section 1144 sets a firm deadline: a request to revoke confirmation must be made "before 180 days" after entry of the confirmation order, and the court "may revoke such order if and only if such order was procured by fraud." (Emphasis added.) It would make a mockery of that deadline if a plaintiff could request revocation based on a mere hope that additional discovery might lead to some sort of yet-unknown fraud – but, as explained below, that is what Ms. Cohen seeks to do. She has failed to cite any authority that she can engage in such a fishing expedition.

True, it seems likely (although Ms. Cohen has not established as much) that a plan proponent might be estopped to assert the 180 day deadline if that plan proponent were shown to have hidden all facts that could arouse suspicions, thereby effectively preventing discovery before the end of the 180 day period. But that is not the situation.

To the contrary, from the start of this case to the present, Ms. Cohen has constantly voiced her suspicions to the Committee, this Court, and anyone who would listen. *See, e.g.,* case dkt. 1014. In fact, the Committee, acting on behalf of all creditors, has been well aware of these allegations and has "reviewed the divorce file" as well as paying close attention to Ms. Cohen's allegations throughout this bankruptcy case; and yet it opposes revocation of the Plan Confirmation Order. Adv. dkt. 25, p. 5:5–6. All other parties in interest who did not wish to rely on the Committee were equally free to inquire about the contents of the divorce file, as well as the proceedings in this case.

Ms. Cohen, and anyone else who wished to engage in any further discovery, has had multiple years in which this case has been pending to seek formal discovery through a Rule 2004 exam or otherwise. In addition, Ms. Cohen has had more years in which she was free to conduct formal discovery during the protracted divorce proceedings prior to commencement of this bankruptcy case. In addition to any formal

discovery, as the debtor points out, Ms. Cohen had access to considerable information as the co-trustor of various trusts.

Ms. Cohen is not entitled to yet another bite at the apple. *See, e.g., In re Bennington*, 519 B.R. 545, 548–49 (Bankr. D. Utah 2014) ("Almost all of the allegations found in the Amended Complaint were raised by Bowman prior to the confirmation hearing in such a way that at the confirmation hearing, the Court and creditors were made aware of the allegations when considering the question of plan confirmation … and therefore cannot serve as a basis to revoke the Debtors' confirmation order under § 1144."); *In re Terrestar Corporation*, 2015 WL 5719469, at *6–7 (Bankr. S.D.N.Y., Sept. 29, 2015) ("Finally, the Court notes that many of the arguments raised in the Complaint were previously raised and rejected by this Court and, therefore, may not be reargued here.").

In sum, Ms. Cohen has failed to show either a legal basis or a factual basis to grant more time for discovery. Under Section 1144 and Rule 9, a party seeking revocation of a confirmation order must file her complaint, alleging fraud with particularity, "before 180 days" after entry of the confirmation order.

B. Accepting The Non-Conclusory Allegations In Ms. Cohen's FAC, And All Reasonable Inferences From Those Allegations, the Allegedly Undisclosed Assets Were In Fact Sufficiently Disclosed

First, numerous allegations in Ms. Cohen's FAC are simply too conclusory to pass muster. For example, she alleges that she found documents under the car seat that, at best, might lead one to suspect that some sort of undisclosed interests might exist in St. Paul's Tower, or in unspecified property in Iran. But she has had those sorts of suspicions for years, from long before this bankruptcy case was commenced. She (and all other parties in interest) have had ample opportunity for both formal and informal discovery from third parties to attempt to verify whether in fact there are any undisclosed interests in such properties. It is inadequate at this late stage to put forth only these mere suspicions as a basis for a claim, particularly when fraud must be pled

with particularity.

Second, as detailed by the debtor, this Court can take judicial notice that the remaining allegedly undisclosed assets were in fact disclosed, with the possible exception of immaterial nondisclosures. Ms. Cohen has not sufficiently alleged any basis for a plausible claim that the Plan Confirmation Order was procured by any fraud.

The parties organize their arguments by letters "A" through "R" referring to property interests alleged in the FAC. *See, e.g.,* dkt. 11, p. 9:15–27:16. This Court adopts the same nomenclature for ease and consistency:

(A) St. Paul Tower. As set forth above, Ms. Cohen's vague allegations are too conclusory to pass muster. The debtor asserts that there is nothing to disclose. Adv. dkt. 11, pp. 9:20-10:12. The burden is not on the debtor to prove a negative. Rather, the burden was on Ms. Cohen to allege, with particularity, the debtor's purported nondisclosures of actual property interests. She has failed to do so. *See id. and* adv. dkt. 27, pp. 8:13-10:7.

Note: To the extent that the documents cited by this Court include the parties' evidentiary disputes, those matters are not cited by this Court for the credibility of any of the matters asserted, but instead only to illustrate that the FAC fails to assert anything but conclusory allegations about a suspicion of an interest in St. Paul Tower. That is insufficient for a claim under Section 1144 that must plead fraud with particularity. The same analysis applies below with respect to the parties' other evidentiary disputes.

(B) St. Paul Square. The same analysis applies. See adv. dkt. 11, p. 10:12-20; *and* adv. dkt. 27, p. 10:8-24.

(C) NorthGlenn. Ms. Cohen does not dispute that the debtor disclosed his interest in this property, but contends that his disclosure was not a "good faith disclosure." *See* dkt. 20, p. 6:20–21. As shown by the debtor, he disclosed his interest in this property in numerous places in the record in this case. *See* dkt. 11, pp. 11:9-13:3; *and* adv. dkt. 27, pp. 10:25-12:22. The debtor's repeated disclosures here are sufficient as a matter of law, and Ms. Cohen has failed to state a claim for fraud under

Section 1144.

(D) Property in Iran. Again, Ms. Cohen's vague allegations are too conclusory to pass muster. *See* adv. dkt. 11, pp. 13:4-14:8; *and* adv. dkt. 27, pp. 12:23-13:18.

(E) Riverway Holdings, L.P. The debtor has made sufficient disclosures required by the SOFA as to any tangential interest in the Riverway Holdings, L.P. As the debtor argues, he made repeated and ample disclosures of his interests in this and related entities. Adv. dkt. 11, pp. 14:9-16:25; *and* adv. dkt. 27, pp. 13:19-16:18.

The only case cited by Ms. Cohen in support of her contention that the debtor's disclosures were insufficient is readily distinguishable. *See In re Meabon*, 508 B.R. 626, 632 (Bankr. W.D.N.C.) *aff'd*, 514 B.R. 446 (W.D.N.C. 2014) *and motion for relief from judgment denied sub nom. In re: Meabon*, 535 B.R. 640 (Bankr. W.D.N.C. 2015). That case involved an action to revoke a debtor's discharge, after the debtor repeatedly failed to disclose an interest in a 1985 Trust. When he finally did disclose it, it was after the deadline to file a complaint objecting to his discharge – he listed the asset as having an "unknown" value, which prompted the chapter 7 trustee to investigate and discover that it had substantial value. In contrast, in this case the debtor disclosed all that was required, multiple times in the record, as shown by the documents which are properly the subject of judicial notice.

(F) 2550 CFT, LP and CFT 2550 HW GP, Inc. Just as with Riverway Holdings, L.P., the debtor has adequately disclosed his interest in these entities and the 2550 Hollywood Way Property in numerous ways. Adv. dkt. 11, pp. 16:25 – 19:12; *and* adv. dkt. 27, pp. 16:12-18:11. Ms. Cohen asserts (*e.g.,* FAC ¶ 60.c.) that the debtor fraudulently concealed the value of this property by listing it as "unknown," and at oral argument her counsel asserted that "unknown" should be read to be the equivalent of being valueless. That argument is repeated with respect to numerous assets, and it is frivolous. If anything, listing this asset as having "unknown" value was an invitation to investigate (assuming without deciding that Ms. Cohen, and any other parties in

interest, did not already have a sufficient sense of the value of the debtor's interests in these properties).

(G) Vernon RBL. For the same reasons set forth above, this Court not not persuaded that the debtor made any material nondisclosure regarding the Vernon RBL property. *See* adv. dkt. 11, p. 19:13-28; *and* adv. dkt. 27, p. 18:12-20.

(H) 5001 Joerns Drive, LLC. Contrary to Ms. Cohen's assertion that disclosures in the divorce action are not relevant to the present proceedings, they are very relevant because, as explained above, she was already on notice of those things, and any other party in interest who wished to investigate in response to her repeated allegations of hidden assets could seek discovery of matters revealed in the divorce proceedings. See adv. dkt. 20:1-21:2; *and* adv. dkt. 27, pp. 18:21-20:2.

Moreover, it appears that the debtor disclosed his interest in Joerns in this bankruptcy case in his bankruptcy Schedule B and in his response to question 18.a. of his SOFA, and provided further detail of his interests in Joerns in his disclosure statement. The debtor disclosed information regarding his interest (a 24% interest in an entity that owns a warehouse in Wisconsin) and that he believed the "asset likely has no value[.]" See Ex. 18 to RJN, p. 13:5–9. These are the exact types of disclosures that Ms. Cohen contends the debtor was required to make. *See* adv. dkt. 21, pp. 12:20–26.

(I) Wells Fargo accounts. It appears that the debtor has disclosed all that is required of him related to the accounts listed by Ms. Cohen; and again, Ms. Cohen's conclusory allegations to the contrary are insufficient. *See* adv. dkt. 11, p. 21:3-14; *and* adv. dkt. 27, p. 20:3-18.

(J) Alleged aliases. Ms. Cohen's allegations are, once again, conclusory. In addition, she fails to allege sufficient facts to establish any materiality or causation. See adv. dkt. 11, p. 21:15-28 & n. 9; *and* adv. dkt. 27, p. 20:19-26.

(K) Value of Loans to the Children's Trust. This Court is satisfied that as a matter of law Ms. Cohen fails to state a claim that the debtor failed adequately to disclose the loans to the Children's Trust on his bankruptcy Schedule B. *See* adv. dkt.

11, p. 22:1-19; *and* adv. dkt. 27, pp. 20:27-21:14. Again, Ms. Cohen's counsel's argues that an "unknown" valuation means valueless. That is nonsense. If anything, listing a value as "unknown" is likely to prompt further inquiry. Ms. Cohen, and all other parties in interest, had ample time in which to make any such inquiries, including through formal discovery. Additionally, valuation issues were contemplated and discussed during the Plan confirmation process.

(L) Value of Loan to Amp Plus, Inc. For the same reasons as those discussed above, Ms. Cohen has failed to establish any fraud in connection with any purported nondisclosure of the value of the loan to Amp Plus. Adv. dkt. 11, p. 22:20-23:12; *and* adv. dkt. 27, pp. 21:15-22:6. The debtor listed the loan in an exhibit to the disclosure statement and the valuation issues of Amp Plus were addressed in the litigation during this bankruptcy and were contemplated in the Plan confirmation process.

(M) Seohyun International, Ltd. The debtor disclosed his interest in this entity and, in fact, Ms. Cohen previously asserted a non-disclosure of this property to this Court. *See* RJN Ex. 25, para. 8 ("Based upon my review of the documents listed above it appears that the Debtor has been laundering money primarily through a shell company, Seohyun International Ltd, an entity he formed in Hong Kong in 1996 along with Fariba's uncle. I discovered that the Hong Kong corporate register listed Seohyn International Ltd. in Honk Kong as 'live' and 'current' as of February 2015 but now is in the process of being stricken off by the Registrar of Companies Notably, on the Schedules, the Debtor valued his interest in Seohyn International Ltd. in Honk Kong, at $0."). Ms. Cohen's arguments on this issue are unpersuasive. *See* adv. dkt. 11, p. 23:13 – 24:7; *and* adv. dkt. 27, p. 22:7-23.

(N) Liform Industrial Co., Ltd. Ms. Cohen has not sufficiently alleged any nondisclosure, let alone fraud. *See* adv. dkt. 11, p. 24:8-22; *and* adv. dkt. 27, pp. 22:24-23:4.

(O) Other alleged business entities. Ms. Cohen's allegations are, once

again, conclusory and unsupported. *See* adv. dkt. 11, pp. 24:23-25:13; *and* adv. dkt. 27, pp. 23:5-24:2.

(P) Alleged offshore accounts. Ms. Cohen's allegations are, once again, conclusory and unsupported. *See* adv. dkt. 11, p. 25:14-22; *and* adv. dkt. 27, p. 24:3-12.

(Q) CFT Mariners. Ms. Cohen's allegations are, once again, conclusory and unsupported. *See* adv. dkt. 11, pp. 26:1–27:10; *and* adv. dkt. 27, p. 24:13-19.

(R) Alter ego. Ms. Cohen allegations are, more than ever, conclusory and unsupported. *See* adv. dkt. 11, p. 27:11-17; *and* adv. dkt. 27, p. 24:20-25.

C. Alternatively, Assuming For The Sake Of Argument That Any Material Assets Were Undisclosed, Ms. Cohen Fails To State A Plausible Claim That The Order Confirming the Plan Was "Procured" By Fraud

Ms. Cohen must state a claim that the debtor "procured" the Plan Confirmation Order by fraud. *Orange Tree Associates, Ltd.*, 961 F.2d 1445, 1448 (9th Cir. 1992). This "require[s] [allegations that would establish] substantial causation, requiring a showing that the alleged fraud was instrumental in obtaining the confirmation order and made a difference in the process." *In re V & M Mgmt., Inc.*, 215 B.R. 895, 903 (Bankr. D. Mass. 1997) (emphasis added). Ms. Cohen fails to satisfy these requirements.

The Committee (and Ms. Cohen) were well aware of Ms. Cohen's repeated allegations that the debtor had undisclosed assets, so the Plan provided for all assets, whether or not disclosed, to remain in the bankruptcy estate and not revest in the debtor until further order of this Court. *See, e.g.,* Plan, case dkt. 990, p. 42:21–24 ("If [Ms. Cohen] elects Option One under this Plan (*i.e.,* votes to accept this Plan), then on the Plan Effective Date, title to all non-exempt assets of this Estate other than the Primary Lighton Property will remain in the Bankruptcy Estate and shall not revest in the Reorganized Debtor until further order of the Court …."), *and* p. 43:11–13 (same). The Plan Confirmation Order includes an identical restriction. Case dkt. 1110, p. 23:20–23 ("On the Plan Effective Date, title to all non-exempt assets of the Bankruptcy Estate

other than the Primary Lighton Property will remain in the Bankruptcy Estate and shall not revest in the Reorganized Debtor until further order of the Bankruptcy Court ….").

In light of these provisions of the Plan and the Plan Confirmation Order, Ms. Cohen has not established virtually any element of a claim under Section 1144. *See Tenn-Fla Partners*, 229 B.R. 720, 731 (listing elements), *aff'd*, 226 F.3d 746; *V & M Mgmt., Inc.*, 215 B.R. 895, 903. There is no causal element – no nexus – between the alleged fraud and the issuance of the Plan Confirmation Order. *In re Bennington*, 519 B.R. 545, 549 (Bankr. D. Utah 2014) (because nondisclosure of certain assets was not "material" it "cannot serve as a basis to revoke the Debtors' confirmation order under § 1144."); *see also* 8 *Collier* ¶ 1144.03 ("It is not sufficient for the court to find that some fraud was committed in connection with the case.").

Turning to another element, there are no factual allegations to establish a plausible reason for the debtor to intentionally hide assets when his own Plan provides for all such assets to remain part of the bankruptcy estate. Yet another element that Ms. Cohen fails to satisfy is that she has not alleged facts to show how any reliance by her, or any other party in interest (or even this Court), on a lack of undisclosed assets could have been justifiable or reasonable, given her continual refrain that such assets existed and both the actual information she already had and the years in which she could have engaged in both formal and informal discovery.

In sum, Ms. Cohen has failed to allege facts sufficient to state a plausible claim, with particularity, that the debtor "procured" the Plan Confirmation Order by "fraud." Even supposing that there were some material nondisclosure (which she has not adequately alleged), Ms. Cohen's FAC fails to allege sufficient facts to satisfy the elements of a claim under Section 1144. For this alternative reason the FAC must be dismissed.

D. Evidentiary Objections

Both the debtor and Ms. Cohen made a number of evidentiary objections and responses (adv. dkt. 20, 30, 31, 32). Those matters are irrelevant because this Court

has not considered any factual material outside of the FAC, except for matters that are a proper subject of judicial notice (adv. dkt. 15). Therefore this Court need not rule on these objections.

E. Dismissal With Prejudice

Ms. Cohen has not suggested any way in which she could further amend her FAC to cure the deficiencies described above. Her request to be able to add additional allegations is both untimely (beyond the period permitted by Section 1144) and unpersuasive, because her proposed additional allegations would be too conclusory to state a claim. *See* adv. dkt. 27, p. 25:1-24. Therefore the FAC must be dismissed without leave to amend.

F. Motion for Sanctions

The debtor has filed a motion for sanctions (adv. dkt. 17). It is true that some of Ms. Cohen's arguments are frivolous, as noted above; and in addition her motivation appears to be improper. The debtor also notes that this Court has previously referred to arguments by Ms. Cohen as "sleight of hand," and found that she has demonstrated a tendency to 'cut off her nose to spite her face.'" *See Tentative Ruling On Plan Confirmation And Related Issues, Including Claim Objection And Motion For Rule 2004 Examination* ("Tentative Ruling") (case dkt. 1074) (Ex. 27 to RJN), pp. 2:23, 3:25-4:6. This Court will address the motion for sanctions separately.

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V. CONCLUSION

For the foregoing reasons, the motion to dismiss will be GRANTED WITHOUT LEAVE TO AMEND by separate order. Any related procedural issues will be addressed at the status conference at the date and time noted in the caption at the start of this Memorandum Decision.

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Date: May 16, 2016

Neil W. Bason
United States Bankruptcy Judge