



**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

In re:  
ORCHID CHILD PRODUCTIONS, LLC,  
Debtor.

Case No. 2:20-bk-21080-RK  
Chapter 7  
Adv. No. 2:21-ap-01212-RK

**MEMORANDUM DECISION AND ORDER  
ON MOTION OF COUNTERCLAIM-  
DEFENDANTS WHOSE DOG R U  
PRODUCTIONS, INC., AND JAMES  
FRANCO TO DISMISS TRUSTEE'S  
COUNTERCLAIM**

Hearing  
Date: March 26, 2024  
Time: 1:30 p.m.

Place: Courtroom 1675  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, CA 90012

WHOSE DOG R U PRODUCTIONS,  
INC.,  
Plaintiff,  
vs.  
EDWARD M. WOLKOWITZ, CHAPTER 7  
TRUSTEE,  
Defendant.

1 EDWARD M. WOLKOWITZ, Chapter 7  
Trustee,  
2  
3 Counterclaimant,  
4 vs.  
5 WHOSE DOG R U PRODUCTIONS,  
INC., and JAMES FRANCO,  
6  
7 Counterclaim-Defendants.  
8

9 This adversary proceeding came on for hearing on March 26, 2024 before the  
10 undersigned United States Bankruptcy Judge on the motion of counterclaim-defendants  
11 Whose Dog R U Productions, Inc. (Whose Dog), and James Franco (Franco) to dismiss  
12 the Counterclaim<sup>1</sup> of counterclaimant Edward M. Wolkowitz, Chapter 7 Trustee  
13 (Trustee). Appearances were made as noted on the record. Following the hearing on  
14 March 26, 2024, the parties, Whose Dog and Franco and Trustee filed post-hearing  
15 briefs on April 2, 2024 to address the tentative ruling on the motion posted for the  
16 motion on the court's website before the hearing and the arguments made at the  
17 hearing. After the filing of the post-hearing briefs, the court took the motion under  
18 submission.

19 Having considered the moving, opposing and reply papers and the post-hearing  
20 briefs relating to the motion and the oral arguments of the parties at the hearing on  
21 March 26, 2024, the court makes the following rulings.

22 Whose Dog and Franco in the motion make several arguments why the court  
23 should dismiss Trustee's claims for relief in the Counterclaim in this adversary  
24 proceeding for failure to state a claim upon which relief may be granted pursuant to  
25 Federal Rule of Civil Procedure 12(b)(6). See Federal Rule of Bankruptcy Procedure  
26 7012(b), making Federal Rule of Civil Procedure 12(b) applicable to this adversary  
27

28 <sup>1</sup> The "Counterclaim" filed by Trustee consists of nine separate claims for relief against Whose Dog  
and/or Franco. Docket No. 88. Docket entries refer to documents filed in this adversary proceeding  
unless otherwise noted, such as in the main bankruptcy case of Debtor Orchid Child.

1 proceeding. Whose Dog and Franco argue that Trustee may not rely upon California  
2 procedural law to relate the counterclaim back to the filing of their complaint initiating  
3 this adversary proceeding and that only Federal Rule of Civil Procedure 15 applies and  
4 does not permit any relation back. Motion, Docket No. 105 at 13-23 (internal page  
5 citation at 12-22); see also, Federal Rule of Bankruptcy Procedure 7015 which makes  
6 Federal Rule of Civil Procedure 15 applicable to this adversary proceeding. Whose Dog  
7 and Franco also argue that Trustee's claims in his counterclaim fail to allege legally  
8 cognizable claims. Motion, Docket No. 105 at 23-32 (internal page citation at 22-31)

9       The argument of Whose Dog and Franco that California procedural law does not  
10 apply here because of Federal Rule of Civil Procedure 15 lacks merit because the plain  
11 language of Rule 15(c)(1)(A) recognizes that "[a]n amendment to a pleading relates  
12 back to the date of the original pleading when: (A) the law that provides the applicable  
13 statute of limitations allows relation back . . . ." That is, since California law provides the  
14 applicable statute of limitations, applicable California law would allow relation back to  
15 the date of the "original pleading," the trustee's answer, served and filed on November  
16 11, 2021, as set forth in the case law that recognizes that the filing of the original  
17 complaint, such as the original complaint filed by Whose Dog in this adversary  
18 proceeding on October 12, 2021, tolls the statute of limitations as to any cross-  
19 complaint or counterclaim against them arising out of the same "contract, transaction,  
20 matter, happening or accident" upon which action was brought by Whose Dog.

21 *Trindade v. Superior Court*, 29 Cal.App.3d 857, 859-860 (1973) and *Paredes v. Credit*  
22 *Consulting Services, Inc.*, 82 Cal.App.5th 410, 428 (2022), cited in, Banke and Segal,  
23 *Rutter Group California Practice Guide: Civil Procedure Before Trial – Statutes of*  
24 *Limitations*, ¶.8:240 (online edition February 2024 update); see also, *Blaser v. State*  
25 *Teachers' Retirement System*, 37 Cal.App.5th 349, 377 (2019), citing *inter alia*, *Jones v.*  
26 *Mortimer*, 20 Cal.2d 627, 633 (1946). Thus, as to Whose Dog, since it filed the original  
27 complaint in this matter, the statute of limitations as to any counterclaims against it was  
28 tolled when it filed its complaint on October 12, 2021, and Rule 15(c)(1)(A) recognizes

1 relation back to the date of the trustee’s answer as his original pleading on November  
2 11, 2021, which was timely as the statute of limitations for any counterclaim was tolled  
3 when Whose Dog filed its complaint on October 12, 2021. Presumably, the date on  
4 which the statute of limitations began to run was on May 31, 2018, the date of the  
5 alleged breach of contract asserted by the Debtor, and any four-year statute of  
6 limitations was tolled when the adversary complaint was filed on October 12, 2021.

7 However, this rationale does not apply to Franco, who is a new party to the  
8 adversary proceeding as he was not the party which filed the original complaint in this  
9 adversary proceeding, which was Whose Dog. *Boyer v. Jensen*, 129 Cal.App.4th 62, 70  
10 (2005), cited in, Banke and Segal, *Rutter Group California Practice Guide: Civil*  
11 *Procedure Before Trial – Statutes of Limitations*, ¶8:255. That is, the court rejects  
12 Whose Dog’s argument that it is a new party to the Counterclaim because it was not a  
13 new party to the adversary proceeding since it is an existing party to the adversary  
14 proceeding, having commenced it.

15 The court’s discussion above is substantially the same as in its tentative ruling<sup>2</sup> to  
16 which Whose Dog and Franco expressed disagreement in their supplemental brief,  
17 arguing as follows:

18 The Court is of the tentative opinion that, as to Whose Dog, the filing of  
19 Whose Dog’s complaint tolled the statute of limitations as to any counterclaim by  
20 the Trustee citing as authority, *Trindale v. Sup. Ct.*, 29 Cal.App.3d 857, 859-860,  
21 and Rutter Group Practice Guide, Civil Proc. Before Trial-Statutes of Limitation ¶  
22 8:240. These authorities, however, do not address an **amendment** under Rule  
15 to an Answer to add a new Counterclaim against newly added Cross-  
23 Defendants. The Trustee has not addressed Rule 15 in his briefs.

24 Rule 15(c)(1) applies to determine whether the newly filed Counterclaims  
25 relate back to a the prior “original pleading,” i.e., here the **Answer** (not the  
26 Complaint).

27 Under Rule 15(c)(1), for the reasons set forth in Cross-Defendants’ Motion  
28 to Dismiss and Reply, the statute of limitations has run as to the claims asserted.  
The applicability of Rule 15(c)(1) is discussed here because Cross-Defendants  
believe that the Tentative is incorrect on this point.

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<sup>2</sup> A copy of the court’s tentative ruling on the motion posted on the court’s website on March 25, 2024  
before the hearing is attached hereto.

1 The Trustee was granted leave earlier this year to amend his Answer to  
2 include a newly asserted Counterclaim. Under Rule 15(c)(1), for relation back to  
3 apply and to avoid the statutes of limitation barring such claims, the Trustee must  
4 establish **either** that: (1) California law allows relation back to the **Answer** when  
5 a new counterclaim is added by amendment (Rule 15(c)(1)(A)), **or** (2) if the  
6 newly asserted Counterclaim names a new cross-defendant, the requirements of  
7 Rule 15(c)(1)(C) are satisfied here. Neither requirement can be met here.

8 As to Rule 15(c)(1)(A), while the Court correctly states that under  
9 California law the filing of a complaint tolls the statute of limitations as to a  
10 counterclaim against a Plaintiff relating to the same contract, transaction, etc.,  
11 the requirement for relation back in Federal Court in the context of an  
12 amendment to add a counterclaim is more specific. While the statute of  
13 limitations may have been tolled under California law as to an **original**  
14 counterclaim filed with the Answer, the question here is whether an **amendment**  
15 adding a new Counterclaim to an Answer (after all parties agree that the statute  
16 of limitations ran years ago) relates back under Rule 15(c)(1)(A).

17 Rule 15(c)(1)(A) applies to **existing** Cross-Defendants. Since there are  
18 none, even if California law would permit the late filing of an “original”  
19 counterclaim against a plaintiff, Rule 15(c)(1)(A) does not apply here. Moreover,  
20 under California law, if the Trustee wanted to assert new claims against a new  
21 cross-defendant, he would have had to have **previously** alleged counterclaims  
22 and named Doe counter-defendants, which he also did not do. See Motion at 14-  
23 16.

24 Rule 15(c)(1)(C) applies to **newly named** Cross-Defendants – both  
25 Whose Dog and Franco. The Trustee cannot and has not met the requirements  
26 set forth therein, i.e., among other things, the new counterclaims were  
27 indisputably not timely asserted and served per Rule 4(m), i.e., within 90 days  
28 after the Answer was originally filed and served. See Motion at 16-22

Supplemental Brief of Whose Dog and Franco, Docket No. 113 at 6-8 (internal page  
citation at 4-6) (emphasis in original). The court does not agree with, and rejects, this  
argument made by Whose Dog and Franco because Rule 15(c)(1)(A) does not limit  
relation back to existing counterclaims and existing counterclaim-defendants because  
its language broadly refers to “the law that provides the applicable statute of limitations  
[that] allows relation back,” that is, here California law, which the court has recognized  
as discussed above. Thus, the court does not agree with Whose Dog’s overly narrow  
construction of Rule 15(c)(1)(A) and California law stating that the latter does not apply  
to an answer as an original pleading since the tolling event under California law for  
counterclaims is the filing of the complaint.

1 As to both Whose Dog and Franco, under Rule 15(c)(1)(A), California law of  
2 equitable tolling may apply to toll the statute of limitations on the trustee's counterclaims  
3 against them. See, *Law Finance Group, LLC v. Key*, 14 Cal.5th 932, 952 (2023); *Saint*  
4 *Francis Memorial Hospital v. State Department of Public Health*, 9 Cal.5th 710, 720  
5 (2020) and *Addison v. State of California*, 21 Cal.3d 313, 320-321 (1978), cited in,  
6 Banke and Segal, *Rutter Group California Practice Guide: Civil Procedure Before Trial –*  
7 *Statutes of Limitations*, ¶¶6:6-6:7.1; see also, *McDonald v. Antelope Valley Community*  
8 *College District*, 45 Cal.4th 88, 99 (2008). That is, equitable tolling may apply to  
9 suspend the statute of limitations where a plaintiff has several alternative remedies, and  
10 makes a good faith, reasonable decision to pursue one remedy, and it later becomes  
11 necessary to pursue the other. *Elkins v. Derby*, 12 Cal.3d 410, 412-413 (1974); and  
12 *Saint Francis Memorial Hospital v. State Department of Public Health*, 9 Cal.5th at 725,  
13 cited in, Banke and Segal, *Rutter Group California Practice Guide: Civil Procedure*  
14 *Before Trial – Statutes of Limitations*, ¶¶6:26. Such equitable tolling may apply to  
15 arbitration proceedings. Banke and Segal, *Rutter Group California Practice Guide: Civil*  
16 *Procedure Before Trial – Statutes of Limitations*, ¶¶6:60-6:60.1, citing *inter alia*,  
17 *Rodriguez v. Southern California District Council of Laborers*, 160 Cal.App.3d 956, 961  
18 (1984) and *Marcario v. County of Orange*, 155 Cal.App.4th 397, 408 (2007); see also,  
19 *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274-1277 (9<sup>th</sup> Cir. 1993) (applying  
20 California law of statute of limitation and equitable tolling to claim under 42 U.S.C. §  
21 1983).

22 Trustee apparently asserts that the equitable tolling applies to the entire time  
23 when the disputes between Debtor Orchid Child Productions, LLC (Debtor) and Whose  
24 Dog and Franco were in arbitration as they were all parties to the arbitration. However,  
25 the court believes that there are factual issues as to whether equitable tolling saves  
26 Trustee's counterclaims for any applicable four year statute of limitations under  
27 California law as equitable tolling must apply only where a plaintiff, or Trustee and his  
28 predecessor, Debtor, as counterclaimant, has pursued its alternative remedy of

1 arbitration. Apparently, any cause of action from breach of contract accrued to Debtor  
2 in May 2018, and there was no equitable tolling until Whose Dog filed its arbitration  
3 demand on May 1, 2020, which initiated the alternative remedy. On or about May 20,  
4 2020, Debtor filed its answering statement and counterclaims in the arbitration  
5 proceeding, and on or about November 13, 2020, Franco filed his answer to Debtor's  
6 counterclaims in arbitration and his own counterclaims in arbitration. These  
7 circumstances indicate that Debtor was reasonably pursuing its alternative remedy in  
8 arbitration during this time period, but on December 21, 2020, Debtor filed its  
9 bankruptcy petition, commencing this Chapter 7 bankruptcy case, which stayed the  
10 arbitration proceedings. On October 12, 2021, Whose Dog filed its complaint  
11 commencing this adversary proceeding for declaratory and injunctive relief as to  
12 ownership of the film footage, and on November 11, 2021, Trustee filed his answer to  
13 the adversary complaint without asserting any counterclaims.

14 There are factual issues as the reasonableness of the pursuit by Debtor and  
15 Trustee as its successor in interest in the alternative remedy of arbitration as it appears  
16 that Debtor filed the bankruptcy to stay the arbitration and its successor-in-interest, that  
17 Trustee, has opposed stay relief sought by Whose Dog to allow the arbitration to  
18 proceed, and that when Whose Dog filed its adversary complaint for declaratory and  
19 injunctive relief, there was no impediment to Trustee to file counterclaims which he now  
20 seeks to bring as the arbitration was stayed from the bankruptcy. *See McDonald v.*  
21 *Antelope Valley Community College District*, 45 Cal.4th at 102. The issue appears to  
22 be whether Debtor and/or Trustee reasonably and in good faith pursued the alternative  
23 remedy of arbitration as to the counterclaims, and the court is not so sure that Debtor  
24 and/or Trustee did, so it may be that not all the time claimed by Trustee should be  
25 equitably tolled, but this appears to be a factual issue as to whether the counterclaims  
26 are timely. *See Supplemental Brief of Trustee*, Docket No. 114 at 12-13 (internal page  
27 citation at 9-10). The lack of equitable tolling as a practical matter would only affect the  
28 Trustee's state law claims against Franco as it appears that the claims against Whose

1 Dog are timely based on its filing of the original complaint within the statutes of  
2 limitation.

3 The court's discussion above is substantially the same as in its tentative ruling  
4 which Whose Dog and Franco expressed disagreement in their supplemental brief,  
5 arguing as follows:

6 The facts regarding the Trustee's decision not to pursue any claims  
7 against Whose Dog and Franco are undisputed and support a ruling that  
8 equitable tolling does not apply. After Debtor filed its Bankruptcy Petition and  
9 Whose Dog filed its Complaint in this adversary, the Trustee **intentionally** did  
10 not assert counterclaims against Whose Dog and/or Franco, and **affirmatively**  
11 stated in his Answer, Second Affirmative Defense, that the Complaint was "an  
12 improper attempt to compel the Trustee to engage in litigation over claims that  
13 the Trustee has not decided to pursue." For the first time at the hearing on March  
14 26, 2024, and despite many previous opportunities to set-the-record-straight, the  
15 Trustee's counsel asserted that what the Trustee, i.e., his counsel who drafted  
16 the Affirmative Defense, really meant was that the Trustee had not "yet" decided  
17 when he filed his Answer in November 2021 whether or not he intended to  
18 pursue claims against Whose Dog (and that the Counterclaim evidences that he  
19 has now decided). The Trustee's counsel claimed there is a distinction between:  
20 (1) "claims that the Trustee has **not decided** to pursue" as alleged in the Answer  
21 (which he asserted and now claims meant he had not yet decided) and (2)  
22 "claims that the Trustee has **decided not** to pursue" (what he would have said  
23 (but did not) if he really had decided he really was not going to pursue any  
24 claims).

25 Supplemental Brief of Whose Dog and Franco, Docket No. 113 at 8-9 (internal page  
26 citation at 6-7) (emphasis in original; footnote omitted). In the court's view, the issue of  
27 Trustee's intent in not asserting counterclaims in his answer to Whose Dog's adversary  
28 complaint goes to the factual determination of the reasonableness and good faith of  
Trustee's equitable tolling claim, which the court believes that it cannot decide as a  
matter of law on a motion to dismiss, that is, whether Trustee may rely upon the  
doctrine of equitable tolling to assert that his counterclaims are timely. *See Hopkins v.*  
*Kedzierski*, 225 Cal.App.4<sup>th</sup> 736, 755 (2014) ("whether a plaintiff has demonstrated the  
elements of equitable tolling presents a question of fact"), *citing and quoting inter alia*,  
*Marcario v. County of Orange*, 155 Cal.App.4<sup>th</sup> at 408 ("Equitable tolling is a fact-  
intensive issue and it is determined based upon evidence . . .") (citation and internal



1 quotation marks omitted); *see also*, *Cervantes v. City of San Diego*, 5 F.3d at 1274-  
2 1277 (applying California law of statute of limitation and equitable tolling to plaintiff's  
3 claim under 42 U.S.C. § 1983, stating: "The sole issue is whether the complaint, liberally  
4 construed in light of our 'notice pleading' system, adequately alleges facts showing the  
5 *potential* applicability of the equitable tolling doctrine. . . We hold that ordinarily  
6 equitable tolling is not properly resolved at the pleading stage.") (emphasis in original).  
7 In *Cervantes v. City of San Diego*, the Ninth Circuit noted California's three-pronged test  
8 for invocation of doctrine of equitable tolling based on pursuit of an alternative remedy:  
9 "A plaintiff's pursuit of a remedy in another forum equitably tolls the limitations period if  
10 the plaintiff's actions satisfy three factors: 1) timely notice to defendants in filing the first  
11 claim; 2) lack of prejudice to the defendants in gathering evidence for the second claim;  
12 and 3) good faith and reasonable conduct in filing the second claim." 5 F.3d at 1275,  
13 *citing*, *Donoghue v. Orange County*, 848 F.2d 926, 931 (9<sup>th</sup> Cir. 1987) and *Collier v. City*  
14 *of Pasadena*, 142 Cal.App.3d 917, 923 (1983). Regarding this standard, the Ninth  
15 Circuit also observed in *Cervantes v. City of San Diego*: "California's fact-intensive test  
16 for equitable tolling is more appropriately applied at the summary judgment or trial stage  
17 of litigation." *Id.* at 1276. As discussed herein, this observation is applicable here.

18 The court also addresses the arguments of Whose Dog and Franco that  
19 Trustee's claims for relief in his counterclaim fail to allege legally cognizable claims.  
20 Trustee's first and second causes of action for declaratory relief that the estate owns the  
21 film footage and related copyright and may sell such property and his are federal  
22 declaratory relief claims and are not California state declaratory relief claims subject to  
23 some state statute of limitations. Accordingly, the motion to dismiss these claims under  
24 a four year state statute of limitations should be denied. Regarding the motion to  
25 dismiss for failure to state a claim, Trustee has stated plausible claims for declaratory  
26 relief that the estate owns the film footage and related copyright and may sell such  
27 property of the estate as there has been no judicial declaration that the estate owns and  
28 may sell such property, though as Whose Dog and Franco point out, Trustee could seek

1 such relief by motion. That Trustee is proceeding by counterclaim rather than by motion  
2 does not necessarily preclude his proceeding by counterclaim.

3       Regarding the argument of Whose Dog and Franco that Trustee's first claim for  
4 declaratory relief as to ownership of the film footage and related copyright should be  
5 dismissed as moot because Whose Dog has conceded ownership, it appears to the  
6 court that Trustee can seek declaratory relief since there has been no judicial  
7 declaration of its ownership, and if Whose Dog has conceded ownership, then perhaps  
8 it could consent to allow the court to proceed to enter judgment in favor of Trustee on  
9 that claim for relief.

10       Regarding his third claim for relief for unjust enrichment, Trustee has agreed in  
11 his opposition to the motion to dismiss to dismiss this claim without prejudice, and  
12 therefore, the motion to dismiss should be granted as to this claim, which should be  
13 dismissed without prejudice.

14       Regarding Trustee's fourth and fifth claims for anticipatory breach of contract,  
15 sixth claim for promissory estoppel and seventh claim for breach of the covenant of  
16 good faith and fair dealing, the court agrees with Trustee that Federal Rule of Civil  
17 Procedure 8(d)(3) permits him to allege claims asserting inconsistent theories of relief  
18 and would deny the motion to dismiss on this ground. As to the argument of Whose  
19 Dog and Franco that Trustee's sixth claim for promissory estoppel is time-barred under  
20 the two year statute of limitations under California Code of Civil Procedure § 339(1),  
21 there is a factual issue regarding timeliness as the alleged breach of promise set forth in  
22 the Counterclaim occurred in May 2018 and the alleged tolling event of Whose Dog's  
23 commencement of arbitration occurred on May 1, 2020.

24       Regarding Trustee's eighth and ninth causes of action objecting to the claims of  
25 Whose Dog and Franco, Trustee has stated plausible claims that his objections to their  
26 claims should be disallowed, and notice pleading under Federal Rule of Civil Procedure  
27 8 is sufficient.

28       For the foregoing reasons, the court will deny the motion to dismiss, except

1 grants in part the motion as to the third claim for relief, which Trustee agrees to dismiss  
2 without prejudice.

3 Accordingly, the court orders as follows:

- 4
- 5 1. Based on Trustee's concession as to his third claim for relief in the  
6 Counterclaim, the motion is granted as to this claim, which is dismissed  
7 without prejudice.
  - 8 2. Otherwise, the motion is denied.
  - 9 3. Whose Dog and Franco must serve their answer in accordance with Federal  
10 Rule of Bankruptcy Procedure 7012 within 21 days of the date of entry of this  
11 order and must file their answer pursuant to Federal Rule of Civil Procedure  
12 5(d), made applicable to this adversary proceeding by Federal Rule of  
13 Bankruptcy Procedure 7005.

14 IT IS SO ORDERED.

15 ###

16  
17  
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19  
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22  
23  
24 Date: April 22, 2024



Robert Kwan  
United States Bankruptcy Judge

1 ATTACHMENT – TENTATIVE RULING ON MOTION

2 Updated tentative ruling as of 3/25/24.

3  
4 Regarding the motion to dismiss, the court's tentative ruling is that the argument of  
5 Whose Dog and Franco that California procedural law does not apply here because of  
6 Federal Rule of Civil Procedure 15 lacks merit because the plain language of Rule  
7 15(c)(1)(A) recognizes that "[a]n amendment to a pleading relates back to the date of  
8 the original pleading when: (A) the law that provides the applicable statute of limitations  
9 allows relation back . . . ." That is, since California law provides the applicable statute of  
10 limitations, applicable California law would allow relation back as set forth in the case  
11 law that recognizes that the filing of the original complaint, such as the original  
12 complaint filed by Whose Dog in this adversary proceeding, tolls the statute of  
13 limitations as to any cross-complaint or counterclaim against them arising out of the  
14 same "contract, transaction, matter, happening or accident" upon which action was  
15 brought by Whose Dog. *Trindade v. Superior Court*, 29 Cal.App.3d 857, 859-860  
16 (1973) and *Paredes v. Credit Consulting Services, Inc.*, 82 Cal.App.5th 410, 428 (2022),  
17 *cited in*, Banke and Segal, *Rutter Group California Practice Guide: Civil Procedure*  
18 *Before Trial – Statutes of Limitations*, ¶8:240 (online edition February 2024 update);  
19 *see also*, *Blaser v. State Teachers' Retirement System*, 37 Cal.App.5th 349, 377 (2019),  
20 *citing inter alia*, *Jones v. Mortimer*, 20 Cal.2d 627, 633 (1946). Thus, as to Whose Dog,  
21 since it filed the original complaint in this matter, the statute of limitations as to any  
22 counterclaims against it was tolled when it filed its complaint in 2021. Presumably, the  
23 date on which the statute of limitations began to run was on May 31, 2018, the date of  
24 the alleged breach of contract asserted by the Debtor, and any four-year statute of  
25 limitations was tolled when the adversary complaint was filed in 2021. However, this  
26 rationale does not apply to Franco, who is a new party as he was not the party which  
27 filed the original complaint in this adversary proceeding, which was Whose Dog. *Boyer*  
28 *v. Jensen*, 129 Cal.App.4th 62, 70 (2005), *cited in*, Banke and Segal, *Rutter Group*  
*California Practice Guide: Civil Procedure Before Trial – Statutes of Limitations*, ¶8:255.

20 As to both Whose Dog and Franco, under Rule 15(c)(1)(A), California law of equitable  
21 tolling may apply to toll the statute of limitations on the trustee's counterclaims against  
22 them. *See*, *Law Finance Group, LLC v. Key*, 14 Cal.5th 932, 952 (2023); *Saint Francis*  
23 *Memorial Hospital v. State Department of Public Health*, 9 Cal.5th 710, 720 (2020) and  
24 *Addison v. State of California*, 21 Cal.3d 313, 320-321 (1978), *cited in*, Banke and  
25 Segal, *Rutter Group California Practice Guide: Civil Procedure Before Trial – Statutes of*  
26 *Limitations*, ¶¶6:6-6:7.1; *see also*, *McDonald v. Antelope Valley Community College*  
27 *District*, 45 Cal.4th 88, 99 (2008). That is, equitable tolling may apply to suspend the  
28 statute of limitations where a plaintiff has several alternative remedies, and makes a  
good faith, reasonable decision to pursue one remedy, and it later becomes necessary  
to pursue the other. *Elkins v. Derby*, 12 Cal.3d 410, 412-413 (1974); and *Saint Francis*  
*Memorial Hospital v. State Department of Public Health*, 9 Cal.5th at 725, *cited in*, Banke  
and Segal, *Rutter Group California Practice Guide: Civil Procedure Before Trial –*  
*Statutes of Limitations*, ¶¶6:6:26. Such equitable tolling may apply to arbitration  
proceedings. Banke and Segal, *Rutter Group California Practice Guide: Civil Procedure*

1 *Before Trial – Statutes of Limitations, ¶¶6:60-6:60.1, citing inter alia, Rodriguez v.*  
2 *Southern California District Council of Laborers*, 160 Cal.App.3d 956, 961 (1984) and  
3 *Marcario v. County of Orange*, 155 Cal.App.4<sup>th</sup> 397, 408 (2007). The trustee apparently  
4 asserts that the equitable tolling applies to the entire time when the disputes between  
5 Debtor and Whose Dog and Franco were in arbitration as they were all parties to the  
6 arbitration. However, the court believes that there are factual issues as to whether  
7 equitable tolling saves the trustee’s counterclaims for any applicable four year statute of  
8 limitations under California law as equitable tolling must apply only where a plaintiff, or  
9 the trustee and his predecessor, Debtor, pursue its alternative remedy of arbitration.  
10 Apparently, any cause of action from breach of contract accrued to Debtor in May 2018,  
11 and there was no equitable tolling until Whose Dog filed its arbitration demand on May  
12 1, 2020. On or about May 20, 2020, Debtor filed its answering statement and  
13 counterclaims in the arbitration proceeding, and on or about November 13, 2020,  
14 Franco filed his answer to Debtor’s counterclaims in arbitration and his own  
15 counterclaims in arbitration. These circumstances indicate that Debtor was reasonably  
16 pursue its alternative remedy in arbitration during this time period, but on December 21,  
17 2020, Debtor filed its bankruptcy petition, commencing this Chapter 7 bankruptcy case,  
18 which stayed the arbitration proceedings. On October 12, 2021, Whose Dog filed its  
19 complaint commencing this adversary proceeding for declaratory and injunctive relief as  
20 to ownership of the film footage, and on November 11, 2021, the trustee filed its answer  
21 without asserting any counterclaims. There are factual issues as the reasonableness of  
22 the pursuit by Debtor and the trustee as its successor in interest in the alternative  
23 remedy of arbitration as it appears that Debtor filed the bankruptcy to stay the arbitration  
24 and has opposed stay relief sought by Whose Dog to allow the arbitration to proceed,  
25 and when Whose Dog filed its adversary complaint for declaratory and injunctive relief,  
26 there was no impediment to the trustee to file counterclaims which he now seeks to  
27 bring as the arbitration was stayed from the bankruptcy. *See McDonald v. Antelope*  
28 *Valley Community College District*, 45 Cal.4<sup>th</sup> at 102. The issue is whether the trustee  
reasonably and in good faith pursued the alternative remedy as opposed to the  
counterclaims, and the court is not so sure that he did, so it appears that not all the time  
claimed should be equitably tolled, but this appears to be a factual issue as to whether  
the counterclaims are timely. The lack of equitable tolling as a practical matter would  
only affect the noncore state law counterclaims against Franco as it appears that the  
counterclaims as to Whose Dog are timely based on its filing of the original complaint  
within the statutes of limitations.

The trustee’s first and second causes of action for declaratory relief that the estate owns  
the film footage and related copyright and may sell such property and his are federal  
declaratory relief claims and are not California state declaratory relief claims subject to  
some state statute of limitations. Accordingly, the motion to dismiss these claims under  
a four year state statute of limitations should be denied. Regarding the motion to  
dismiss for failure to state a claim, the trustee has stated plausible claims for declaratory  
relief that the estate owns the film footage and related copyright and may sell such  
property of the estate as there has been no judicial declaration that the estate owns and  
may sell such property, though as Whose Dog and Franco point out, the trustee could

1 seek such relief by motion. That the trustee is proceeding by counterclaim rather than  
2 by motion does not necessarily preclude his proceeding by counterclaim.

3 Regarding the argument of Whose Dog and Franco that the trustee's first counterclaim  
4 for declaratory relief as to ownership of the film footage and related copyright should be  
5 dismissed as moot because Whose Dog has conceded ownership, it seems to the court  
6 that the trustee can seek declaratory relief since there has been no judicial declaration  
7 of its ownership, and if Whose Dog has conceded ownership, then the court inquires of  
8 Whose Dog and Franco whether it can proceed to enter judgment in favor of the trustee  
9 on that counterclaim.

10 Regarding the trustee's third counterclaim for unjust enrichment, the trustee has agreed  
11 in his opposition to the motion to dismiss to dismiss this counterclaim without prejudice,  
12 and therefore, the motion to dismiss should be granted as to this counterclaim, which  
13 should be dismissed without prejudice.

14 Regarding the trustee's fourth and fifth counterclaims for anticipatory breach of contract,  
15 sixth counterclaim for promissory estoppel and seventh counterclaim for breach of the  
16 covenant of good faith and fair dealing, the court agrees with the trustee that Federal  
17 Rule of Civil Procedure 8(d)(3) permits him to allege claims asserting inconsistent  
18 theories of relief and would deny the motion to dismiss on this ground.

19 Conclusion: Deny motion to dismiss, except as to the third counterclaim which the  
20 trustee agrees to dismiss without prejudice.

21 Appearances are required on 3/26/24, but counsel and self-represented parties must  
22 appear either in person in the courtroom or remotely through Zoom for Government in  
23 accordance with the court's remote appearance instructions.  
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