UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:	Dean Harris, Debtor.	Case No.: Chapter:	2:21-bk-10152-ER 7

MEMORANDUM OF DECISION DENYING MOTION TO DISMISS BANKRUPTCY CASE

Date:	February 17, 2021
Time:	10:00 a.m.
Location:	Courtroom 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

Crystal Holmes ("Holmes") moves to dismiss a voluntary Chapter 7 petition filed by Dean Harris ("Dean")[1] for "cause," pursuant to § 707(a).[2] Holmes argues that Dean sought bankruptcy protection only to forestall Holmes' attempts to enforce a substantial judgment.

Applying the standards set forth in *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184 (9th Cir. 2000) and *Sherman v. SEC (In re Sherman)*, 491 F.3d 948 (9th Cir. 2007), the Court finds that Holmes has failed to show "cause" for dismissal.[3]

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[1] A given name is used to distinguish Dean Harris from his spouse, Rosalina Harris. No disrespect is intended.

[2] Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

[3] The Court considered the following papers in adjudicating this matter:

I. Facts

A. Crystal Holmes' Judgment Against Rosalina Harris

On May 3, 2018, Holmes filed a complaint against Rosalina Lizardo Harris ("Rosalina") and other parties in the District Court, asserting claims under 42 U.S.C. § 1983 (the "Complaint"). On July 11, 2019, after conducting a jury trial, the District Court entered judgment in favor of Holmes in the amount of $2,265,952.00 (the "Judgment"). RJN, Ex. 4. The jury found that Rosalina, who is a detective employed by the Los Angeles Sheriff's Department (the "LASD"), violated Holmes' Fourth Amendment right to be free from unreasonable arrest without probable cause, and awarded damages of $765,952. *Id.* The jury further found that Rosalina acted with malice, oppression, or reckless disregard of Holmes' constitutional rights, and awarded punitive damages of $1.5 million. *Id.*

On September 19, 2019, the District Court denied Rosalina's renewed motion for judgment as a matter of law. The District Court stated:

> The Court concludes that there was ample evidence to support the jury's verdict. There was sufficient evidence supporting the jury's conclusion that [Rosalina] acted under color of law in procuring [Holmes'] arrest, and that [Rosalina] procured [Holmes'] wrongful arrest without probable cause.

RJN, Ex. 5.

On October 4, 2019, the District Court denied Rosalina's motion for a new trial or, in the alternative, an altered or amended judgment. RJN, Ex. 6. The District Court rejected Rosalina's contention that the award of actual damages was not supported by sufficient evidence. *Id.* The District Court also found that the award of $1.5 million in punitive damages was justified:

> Here, the jury found that [Rosalina] acted "with malice, oppression, or reckless disregard of [Holmes'] constitutional rights" in procuring her wrongful arrest, rather than negligently. The jury concluded that [Rosalina], a law enforcement officer, carried out the wrongful arrest of an innocent person under the authority of her position, in deliberate disregard of [Holmes'] right to be free of unlawful arrest. The Court concludes that this is reprehensible conduct.

Id. (internal citations omitted).

On October 4, 2019, the District Court awarded Holmes attorneys' fees in the amount of $760,397.50, and costs and expenses in the amount of $2,709.29. *Id.* On October 10, 2019,

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1) Notice of Motion and Motion to Dismiss Bankruptcy Case [Doc. No. 26] (the "Motion");
   a) Request for Judicial Notice in Support of Motion to Dismiss Bankruptcy Case [Doc. No. 24] (the "RJN");
   b) Declaration of Anthony R. Bisconti in Support of Motion to Dismiss Bankruptcy Case [Doc. No. 23];
2) Opposition to Motion to Dismiss Bankruptcy Case [Doc. No. 39] (the "Opposition");
3) Trustee's Response to the Judgment Creditor's Motion to Dismiss the Bankruptcy Case [Doc. No. 43]; and
4) Reply in Support of Motion to Dismiss Bankruptcy Case [Doc. No. 44] (the "Reply").

Rosalina appealed the Judgment to the Ninth Circuit. On December 30, 2019, Holmes recorded an abstract of the Judgment against the family residence (the "Property") owned by Rosalina and her spouse, Dean Harris ("Dean").

B. Rosalina's Chapter 11 Petition

On March 13, 2020, Rosalina filed a voluntary Chapter 11 petition (Case No. 2:20-bk-12839-ER). On May 27, 2020, upon Holmes' motion, the Court dismissed Rosalina's petition as having been filed in bad faith. The Court found that Rosalina sought bankruptcy protection as a substitute for posting a supersedeas bond during the appeal of the Judgment and that Rosalina had failed to demonstrate that she could confirm a plan. *See* Doc. Nos. 30 and 33, Case No. 2:20-bk-12839-ER.

On July 23, 2020, the Court awarded Holmes attorneys' fees and costs in the amount of $49,202.44, pursuant to 42 U.S.C. § 1988. The Court found that the fees and costs incurred by Holmes to obtain the dismissal of Rosalina's Chapter 11 petition were compensable because such fees and costs were necessary to protect and enforce the Judgment. *See* Doc. Nos. 58–59, Case No. 2:20-bk-12839-ER.

C. Holmes' Efforts to Enforce the Judgment and Dean's Chapter 7 Petition

On December 8, 2020, upon Holmes' application, the District Court issued an order requiring Rosalina and Dean to show cause why the Property should not be sold to satisfy a portion of the Judgment (the "OSC"). On January 11, 2021, several hours prior to the hearing on the OSC, Dean filed a voluntary Chapter 7 petition. In view of Dean's petition, the District Court continued the hearing on the OSC to February 22, 2021 at 1:30 p.m.

In his schedules, Dean values the Property at $1,025,000.00, and claims a homestead exemption in the Property of $600,000 pursuant to Cal. Civ. Proc. Code § 704.730. Dean's primary unsecured debts consist of credit card debt of approximately $27,000.

D. Summary of Papers Filed in Connection with the Motion to Dismiss

Holmes moves to dismiss Dean's petition "for cause," pursuant to § 707(a). Holmes asserts that dismissal is warranted because (1) Dean's case was filed only to circumvent the Court's dismissal of Rosalina's case and (2) Dean's case lacks a legitimate bankruptcy objective, having been filed only to forestall Holmes' attempts to enforce the Judgment. In the alternative, Holmes argues that the Court should dismiss the case pursuant to its inherent authority under § 105(a).

Dean contends that he filed the case to accomplish legitimate bankruptcy objectives, including (1) obtaining a discharge and (2) claiming a homestead exemption in the Property.

The Chapter 7 Trustee (the "Trustee") does not oppose dismissal of the case, but argues that dismissal may not produce the optimal outcome for Holmes. The Trustee suggests that the Court delay entering a final ruling on the Motion until after the Ninth Circuit has adjudicated Rosalina's appeal of the Judgment. The Trustee notes that the County of Los Angeles (the "County") has offered to pay $1.5 million to settle the Judgment, and suggests that a mediation involving the Trustee, Rosalina, Dean, and the County could be productive.

In reply papers, Holmes makes an additional argument for dismissal that was not set forth in the Motion—that the case must be dismissed, pursuant to § 521(e)(2), because Dean failed to timely provide to Holmes a copy of his tax return.

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II. Discussion

Section 707(a) provides that a Chapter 7 petition may be dismissed "only for cause." In *Hickman v. Hana (In re Hickman)*, 384 B.R. 832, 840 (B.A.P. 9th Cir. 2008), the court observed that the "term 'for cause' is defined in the Bankruptcy Code only by way of a list of three examples—unreasonable delay prejudicial to creditors, nonpayment of filing fees, and not filing schedules—that is plainly incomplete." The *Hickman* court explained that courts should examine the totality of the circumstances in determining whether "cause" under §707(a) is present. *Id.* at 840.

In *Neary v. Padilla (In re Padilla)*, the Ninth Circuit held that a debtor's "bad faith" did not constitute "cause" for dismissal for purposes of § 707(a):

> We note that Chapters 11 and 13 of the Bankruptcy Code each contain a "dismissal for cause" provision that is structured like § 707(a) and includes the same or similar examples of "cause" as § 707(a). However, under the Chapter 11 and Chapter 13 provisions we have held that bad faith does provide "cause" to dismiss Chapter 11 and Chapter 13 bankruptcy petitions. What distinguishes Chapters 11 and 13 from Chapter 7 is the language of the Bankruptcy Code itself and the post-filing relationship between the debtor and his creditors. The Bankruptcy Code specifically mentions good faith in Chapters 11 and 13 when it permits a court to confirm a payment plan only if it is proposed in good faith. No mention of good faith or bad faith is made in Chapter 7. Also, the post-filing debtor-creditor relationship is markedly different in liquidation and reorganization bankruptcies. Chapters 11 and 13, both reorganization chapters, permit the debtor to "retain its assets and reorder its contractual obligations to its creditors. In return for these benefits, ... the debtor [must] approach its new relationship with the creditors in good faith ..." Chapter 7, a liquidation chapter, "requires no ongoing relationship between the debtor and its creditors" and should be available to any debtor willing to surrender all of its nonexempt assets, "regardless of whether the debtor's motive in seeking such a remedy was grounded in good faith." … The Bankruptcy Code's language and the protracted relationship between reorganization debtors and their creditors lead us to conclude that bad faith per se can properly constitute "cause" for dismissal of a Chapter 11 or Chapter 13 petition but not of a Chapter 7 petition under § 707(a).

222 F.3d 1184, 1192–93 (9th Cir. 2000) (footnotes and internal citations omitted).[4]

Expanding upon *Padilla*, the Ninth Circuit has held that if the circumstances alleged to constitute cause for dismissal are "contemplated by any specific Code provision applicable to Chapter 7 petitions," then such circumstances do not constitute cause for dismissal within the meaning of §707(a). *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 970 (9th Cir. 2007). In

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[4] The Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA") partially overruled *Padilla* by adding the means test, codified at § 707(b). When applying the means test, the Court is required to consider "whether the debtor filed the petition in bad faith," § 707(b)(3)(A). The changes made by BAPCPA have no effect upon the instant Motion, because Holmes seeks dismissal only under § 707(a), not under § 707(b). Without deciding the issue, the Court notes that dismissal under § 707(b) would likely not be a remedy available to Holmes. Section 707(b) applies only to debtors "whose debts are primarily consumer debts." Here, the Judgment, which is *not* a consumer debt, appears to constitute the majority of Dean's indebtedness.

Sherman, the SEC asserted that various types of misconduct that the debtors had allegedly engaged in constituted cause for dismissal. The Ninth Circuit assumed without deciding that the debtors had engaged in all the misconduct alleged, but held that dismissal was nonetheless not warranted. The court explained:

> [B]ecause other Code provisions contemplate (1) taking refuge from the jurisdiction of another court; (2) engaging in a "scorched earth" tactic against a particular creditor; and (3) making misrepresentations in bankruptcy filings, we conclude that there is no "cause" to dismiss the [debtors'] bankruptcy petition because of any such behavior. To respect the complex statutory scheme that Congress has created to deal with malfeasance associated with bankruptcy petitions, we are loath to hold that a factor constitutes "cause" unless the Bankruptcy Code regime is incapable of righting wrongs of the kind alleged.

Sherman, 491 F.3d 948, 974 (9th Cir. 2007).

The restrictive construction of § 707(a) set forth in *Padilla* and *Sherman* is the minority view. The majority view, adopted by most of the other circuits, holds that "bad faith" can constitute cause for dismissal under § 707(a). The Fourth Circuit has aptly summarized the difference between majority and minority views:

> For the most part, courts have recognized that a debtor's bad faith in filing may constitute cause for dismissal under § 707(a). *See In re Krueger*, 812 F.3d 365, 370 (5th Cir. 2016) ("[A] debtor's bad faith in the bankruptcy process can serve as the basis of a dismissal 'for cause' ...."); *In re Schwartz*, 799 F.3d 760, 764 (7th Cir. 2015) ("[A]n unjustified refusal to pay one's debts is a valid ground under 11 U.S.C. § 707(a) to deny a discharge of a bankrupt's debts."); *Piazza*, 719 F.3d at 1260–61 ("[T]he power to dismiss 'for cause' in § 707(a) includes the power to involuntarily dismiss a Chapter 7 case based on prepetition bad faith."); *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) ("Section 707(a) allows a bankruptcy court to dismiss a petition for cause if the petitioner fails to demonstrate his good faith in filing."); *In re Zick*, 931 F.2d 1124, 1127 (6th Cir. 1991) ("[L]ack of good faith is a valid basis of decision in a 'for cause' dismissal by a bankruptcy court."). *But see In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000) ("[B]ad faith as a general proposition does not provide 'cause' to dismiss a Chapter 7 petition under § 707(a)."); *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994) (adopting a "narrow, cautious" approach that requires "extreme misconduct falling outside the purview of more specific Code provisions").

Janvey v. Romero, 883 F.3d 406, 412 (4th Cir. 2018).

The Court notes that many of the cases cited by Holmes in support of dismissal are inapposite because they are from circuits that have adopted the more expansive interpretation of "cause." Were the Court writing upon a blank slate, it would find such cases persuasive. However, the Court is bound by the more restrictive construction of "cause" set forth in *Padilla* and *Sherman*. Applying the standards set forth in those cases, the Court finds that Holmes has failed to show "cause" for dismissal of Dean's case.

First, Holmes argues that the case should be dismissed because it was filed to frustrate Holmes' attempts to enforce the Judgment. Assuming *arguendo* that Holmes is correct, such

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misconduct would not constitute "cause" for dismissal. As held by *Sherman:*

> The remedy in the "cause" provision of § 362(d)(1) is a considerably more direct way to deal with a debtor who is improperly using bankruptcy as a refuge from the jurisdiction of another court than the remedy in the "cause" provision of § 707(a). Preventing a debtor from taking advantage of the stay is a remedy tailored to the problem of improper avoidance of jurisdiction of another court. In contrast, § 707(a)'s remedy—the dismissal of the bankruptcy petition altogether—is too powerful a medicine for the problem at hand, as it precludes adjudication of the bankruptcy even where there are debts aside from pending litigation that exceed assets.

Sherman, 491 F.3d 948, 971–72 (9th Cir. 2007).

Second, Holmes argues that dismissal is warranted because there is no legitimate bankruptcy purpose for Dean's case. Holmes maintains that the stated purposes for the case—obtaining a homestead exemption and a determination that the Judgment is dischargeable—are illusory because Dean would be entitled to a homestead exemption outside of bankruptcy, and because the Judgment is non-dischargeable pursuant to § 523(a)(6) under principles of issue preclusion.

On the present record, the Court cannot find that there is *no* legitimate bankruptcy purpose for Dean's case. Holmes is correct that Dean would be entitled to a homestead exemption outside of bankruptcy. However, it is possible that the filing of the petition may entitle Dean to a larger homestead exemption by changing the date upon which Dean's entitlement to a homestead exemption is calculated. Outside of bankruptcy, the amount of Dean's homestead exemption would be calculated by applying the exemption statutes in effect on December 30, 2019, the date when Holmes obtained an attachment lien against the Property by recording an abstract of the Judgment. *See* Cal. Civ. Proc. Code § 703.050(a) ("The determination whether property is exempt or the amount of an exemption shall be made by application of the exemption statutes in effect (1) at the time the judgment creditor's lien on the property was created"); *see also In re Morgan*, 157 B.R. 467, 469 (Bankr. C.D. Cal. 1993) ("A plain reading of the California exemption scheme provides that … the determination of the amount of an exemption shall be made by application of the exemption statutes in effect at the time the judgment creditor's lien was created. A lien on real property is created by recording an abstract of judgment."). The homestead exemption that Dean would have been entitled to as of the date of the creation of Holmes' attachment lien was $100,000.

Inside bankruptcy, there is a split of authority regarding the appropriate date for calculating the homestead exemption. In *In re Mayer*, the Bankruptcy Appellate Panel (the "BAP") held that the petition date—not the date upon which the attachment lien was created—should be used to determine the amount of the homestead exemption. 167 B.R. 186, 189 (B.A.P. 9th Cir. 1994). In an unpublished disposition issued in 2006, the BAP explained at length why the result set forth in *Mayer* was correct. *See In re Zall*, No. BAP.EC-05-1476-MOSB, 2006 WL 6811022, at *1 (B.A.P. 9th Cir. Sept. 5, 2006). If the Court used the petition date to determine the amount of Dean's homestead exemption, he would likely be entitled to an exemption of $600,000. However, *Mayer* and *Zall* are inconsistent with *Morgan*, which held that the amount of an exemption was calculated by reference to the date upon which the judgment creditor's lien was created, even inside bankruptcy.

The Court makes no ruling upon the amount of Dean's homestead exemption, as that issue is not before it. However, the fact that seeking bankruptcy protection could conceivably allow

Dean to claim a significantly larger homestead exemption ($600,000 instead of $100,000) prevents the Court from finding that the case has no legitimate bankruptcy purpose.

Holmes next contends that Dean's objective of discharging the Judgment is not a legitimate reason for filing the petition. Holmes' theory is that principles of issue preclusion compel a finding that the Judgment is non-dischargeable.

Accepting Holmes' argument would require the Court to reach conclusions regarding the outcome of a dischargeability action outside the context of an adversary proceeding, which would be procedurally improper. Even if the chances of Dean obtaining a discharge of the Judgment are low, the Court cannot say that the filing of a petition with the goal of discharging the Judgment is an illegitimate use of the Bankruptcy Code.

Holmes cites *U.S. Voting Machines, Inc. v. Powelson (In re U.S. Voting Machines, Inc.)*, 2007 WL 4287526, at *1 (N.D. Cal. Dec. 6, 2007), an unpublished decision post-dating *Padilla* and *Sherman*, in support of the contention that the Court may dismiss Dean's case for "cause" by looking to the totality of the circumstances. In *Voting Machines*, a corporation that had previously filed a Chapter 7 petition in Colorado filed a second Chapter 7 petition in California. *Id.* At the time of the filing of the second petition, the corporation's principal was involved in litigation in a Colorado state court over who was entitled to receive the surplus distribution from the corporation's first Chapter 7 case. *Id.* (The surplus proceeds from the first Chapter 7 case had been deposited into the registry of a Colorado state court, which was in the process of determining whether the corporation's principal or a third party was entitled to the funds. *Id.*) Shortly after the filing of the corporation's second case, the surplus proceeds from the first case were transferred from the Colorado state court to the Chapter 7 Trustee appointed in the second case. *Id.* In dismissing the second case, the *Voting Machines* court examined the totality of the circumstances and found that the second case was essentially a two-party dispute over who was entitled to the surplus proceeds from the first case. *Id.* at *3–*4. The court held that dismissal was warranted because at the time the second case was filed, the Colorado state court was already in the process of adjudicating the dispute regarding the surplus proceeds. *Id.*

Contrary to Holmes' argument, *Voting Machines* does not support dismissal of the instant case. There was no legitimate bankruptcy purpose for the filing of the second bankruptcy case in *Voting Machines*, given that a corporation is not entitled to claim exemptions or receive a discharge, and given that bankruptcy was not required to determine how the surplus proceeds would be distributed. By contrast, there are legitimate bankruptcy purposes for Dean's case, including Dean's attempts to obtain a $600,000 homestead exemption and a discharge.[5]

Holmes next argues that the holdings of *Padilla* and *Sherman* are no longer controlling as a result of the Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). In *Marrama*, the Supreme Court considered whether § 706(a) provides a Chapter 7 debtor the absolute right to convert to Chapter 13. Noting that § 1307(c) permits the bankruptcy court to convert or dismiss a Chapter 13 case for "cause," the *Marrama* Court found that the bankruptcy court was not required to convert a Chapter 7 case to Chapter 13 where

[5] As discussed above, the scope of Dean's discharge and the amount of his homestead exemption cannot be determined at this time. Even if Dean does not succeed in obtaining the full amount of the homestead exemption which he claims or obtaining a discharge of the Judgment, that does not mean that Dean's attempts to obtain such relief constituted an illegitimate use of the Bankruptcy Code.

circumstances existed that would justify dismissal of the converted Chapter 13 case under § 1307(c):

> Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process' described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.

Marrama, 549 U.S. at 374–75 (footnotes omitted).

In support of its holding that bankruptcy courts could deny a motion to convert from Chapter 7 to Chapter 13 under appropriate circumstances, the *Marrama* court observed that "[b]ankruptcy courts … routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words 'for cause.'" *Marrama*, 549 U.S. at 365. Pointing to this language, Holmes contends that subsequent to *Marrama*, bad-faith conduct can support dismissal of a Chapter 7 petition "for cause" under § 707(a).

Holmes' argument takes the language of *Marrama* out of context. The language from *Marrama* cited by Holmes was in reference to the dismissal of *Chapter 13* cases, *not* Chapter 7 cases. Even in the Ninth Circuit, there is no dispute that a Chapter 13 case filed in bad faith can be dismissed. *See Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994) ("A Chapter 13 petition filed in bad faith may be dismissed "for cause" pursuant to 11 U.S.C. § 1307(c)."). The issue here is not whether bad-faith can support the dismissal of a Chapter 13 case; it is whether bad-faith can support dismissal of a Chapter 7 case.

Holmes argues that dismissal is mandatory under § 521(e)(2) because Dean did not timely provide her a copy of his tax return. Holmes first raised this argument in her reply papers. Local Bankruptcy Rule ("LBR") 9013-1(g)(4) prohibits the introduction of new evidence or arguments in reply papers. LBR 9013-1(g)(4) is a codification of the Ninth Circuit's well-established "general rule that [litigants] cannot raise a new issue for the first time in their reply briefs." *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996); *see also Daghlian v. DeVry University, Inc.,* 461 F. Supp. 2d 1121, 1143 n. 37 (C.D. Cal. 2006) ("It is improper for the moving party to 'shift gears' and introduce new facts or different legal arguments in the reply brief than [those that were] presented in the moving papers."). Introduction of new arguments in reply papers deprives the opposing party of the opportunity to respond, which violates due process. The Court declines to consider Holmes' arguments under § 521(e)(2), without prejudice to Holmes' ability to renew such arguments by way of a separately-noticed motion.

Holmes asserts that if the Court does not dismiss the case under § 707(a), it should dismiss the case under § 105(a). The Court declines to do so. Where, as here, a specific provision of the Bankruptcy Code commands a certain result, the use of § 105(a) to obtain a different result is not permitted. *Saxman v. ECMC (In re Saxman)*, 325 F.3d 1168, 1174–75 (9th Cir. 2003).

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III. Conclusion

Based upon the foregoing, the Motion to Dismiss is **DENIED**. The Court will enter an order consistent with this Memorandum of Decision.

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Date: February 17, 2021

Ernest M. Robles
United States Bankruptcy Judge