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

In re: Steve H. Chou, Debtor.	Case No.: 2:21-bk-18006-ER Adv. No.: 2:22-ap-01024-ER
Lulai Xia, Plaintiff, v. Steve H. Chou, Defendant.	**MEMORANDUM OF DECISION (1) DENYING MOTION FOR LEAVE TO AMEND AND (2) DENYING MOTION TO DISMISS** **[RELATES TO DOC. NOS. 39 AND 51]** Date: September 14, 2022 Time: 10:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

At the above-captioned date and time, the Court conducted hearings on (1) the *Motion for Leave to File Second Amended Adversary Complaint* [Doc. No. 51] (the "Motion for Leave to Amend") filed by Lulai Xia ("Plaintiff") and (2) the *Motion to Dismiss First Amended Complaint* [Doc. No. 39] (the "Motion to Dismiss") filed by Steve H. Chou ("Defendant"). For the reasons set forth below, the Motion for Leave to Amend is **DENIED** and the Motion to Dismiss is **DENIED**.[1] Defendant shall file an Answer to the First Amended Complaint by no later than **October 21, 2022**.

[1] The Court considered the following pleadings in adjudicating these matters:
1) First Amended Complaint for Declaration that Defendant's Debt to Plaintiff is Non-Dischargeable [Doc. No. 31]
2) Plaintiff's Motion for Leave to Amend:
    a) Plaintiff's Motion for Leave to File Second Amended Adversary Complaint [Doc. No. 51]

I. Facts and Summary of Pleadings

A. Procedural Background

On October 18, 2021 (the "Petition Date"), Defendant filed a voluntary Chapter 7 petition. On January 18, 2022, Plaintiff filed a *Complaint for Declaration that Defendant's Debt to Plaintiff is Non-Dischargeable* [Doc. No. 1] (the "Complaint").

On November 8, 2019, Plaintiff filed a *First Amended Complaint* (the "State Court Complaint," and the action commenced by the filing of the State Court Complaint, the "State Court Action") against Defendant in the Los Angeles Superior Court (the "State Court").[2] The State Court Complaint asserted causes of action for (1) money due on default on note, (2) fraud, (3) negligent misrepresentation, and (4) unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq*. The State Court Complaint sought punitive damages in connection with the cause of action for fraud, and treble damages in connection with the cause of action for unfair business practices. On August 20, 2021, Plaintiff filed a *Request for Dismissal* of her claim for punitive damages. Doc. No. 58, Ex. 2.

On August 19, 2021, the State Court struck Defendant's Answer and entered Defendant's default as a sanction for Defendant's failure to respond to discovery. On May 18, 2022, the State Court denied Defendant's motion to set aside the default.

On March 1, 2022, the Court lifted the automatic stay to enable Plaintiff to pursue the State Court Action to final judgment.

On July 20, 2022, Plaintiff filed a motion for entry of default judgment against Defendant in the State Court (the "Motion for Default Judgment") [Doc. No. 58, Ex. 4]. As explained in the Motion for Default Judgment, Plaintiff "dismissed her punitive damages claim in light of the fact that this case is now proceeding in default." Motion for Default Judgment at 8. However, the Motion for Default Judgment did seek treble damages on Plaintiff's fourth cause of action for unfair business practices. Because Defendant's default had been entered, he was unable to oppose the Motion for Default Judgment. *See Steven M. Garber & Assocs. v. Eskandarian*, 150 Cal. App. 4th 813, 823, 59 Cal. Rptr. 3d 1, 8 (2007), as modified (May 10, 2007), as modified (May 22, 2007) ("The entry of a default cuts off the right to file pleadings and motions, and the right to notices and the service of pleadings.").

On July 21, 2022, the State Court ruled that under *Clark v. Superior Ct.*, 50 Cal. 4th 605, 614–15, 235 P.3d 171, 176 (2010), Plaintiff was entitled only to restitution under her unfair business practices cause of action, not treble damages. The State Court invited Plaintiff to

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   b) Opposition to Motion for Leave to File Second Amended Adversary Complaint [Doc. No. 58]
   c) Plaintiff's Reply [in Support of] Motion for Leave to File Second Amended Adversary Complaint [Doc. No. 59]
3) Defendant's Motion to Dismiss:
   a) Motion to Dismiss First Amended Complaint [Doc. No. 39]
   b) Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss First Amended Complaint [Doc. No. 49]
      i) Notice of Errata Re: First Amended Complaint for Declaration that Defendant's Debt to Plaintiff is Non-Dischargeable [Doc. No. 50]
   c) Reply in Support of Defendant's Motion to Dismiss First Amended Complaint [Doc. No. 55]

[2] The State Court Action has been assigned Case No. 19STCV31334.

present authority showing that she was entitled to treble damages, and directed Plaintiff to file a revised Motion for Default Judgment should she be unable to cite such authority. In response to the State Court's ruling, Plaintiff filed an amended Motion for Default Judgment that omitted the request for treble damages.

On August 11, 2022, the State Court entered default judgment against Defendant [Doc. No. 51, Ex. A] (the "Default Judgment") in the amount of $325,617.89 (consisting of $172,033.00 in damages, $70,981.24 in prejudgment interest, $81,416.00 in attorney's fees, and $1,187.65 in costs). The State Court made the following findings in the Default Judgment:

> Plaintiff loaned money to Defendant with her funds obtained from her divorce and informed Defendant that Plaintiff was unemployed and needed to earn high interest or dividend[s] from investing her funds obtained from her divorce.
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> Defendant represented to Plaintiff that he owned a successful investment company and criticized Plaintiff's plan to invest her funds in real estate, whole life insurance products, and mutual funds.
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> Defendant promised high interest to Plaintiff from loaning the borrowed funds to his investment company.
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> Defendant promised and represented in a signed promissory note dated June 30, 2015, for the sum of $800,000, containing a promise to pay Plaintiff 8.5% interest per annum and a promise that Defendant would pay and indemnify Plaintiff for all tax liabilities, and a provision for attorney fees and costs for the prevailing party.
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> Defendant made these misrepresentations and promises to Plaintiff with the intent to defraud and induce reliance on the part of Plaintiff.
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> Defendant in fact had no investment company and had no intent to give Plaintiff 8.5[%] interest on the borrowed funds.
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> Defendant had no intent to honor his promise to pay and indemnify Plaintiff of any and all tax liabilities.
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> When Defendant made these representations and promises, and when Plaintiff loaned him $800,000, Plaintiff was ignorant of Defendant's secret intention not to perform, and, exercising reasonable diligence, Plaintiff could not have discovered Defendant's secret intention not to pay Plaintiff full interest and not to honor his promise to indemnify Plaintiff of any tax liabilities.
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> Plaintiff loaned Defendant $800,000, reasonably relying on Defendant's false representations and promises to pay 8.5% interest and his payment and indemnification of any and all tax liabilities.
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> Had Plaintiff known of Defendant's actual intention not to make good on his promises, she would not have issued the loan.
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> As a result of Defendant's misrepresentations, Plaintiff suffered monetary loss in the sum of $167,381.00 (the sum Defendant unilaterally deducted from the amount due for his purported payment of tax liabilities) plus $4,652.00 (the sum Defendant unilaterally deducted from the amount due for his unsubstantiated payment of life insurance premiums) for the total sum of $172,033.00.
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> Defendant intentionally, willfully, and maliciously misrepresented, deceived, or concealed a material fact he knew that he had no investment company, that he had no intent to pay 8.5% interest, and that he had no intent to pay and indemnify Plaintiff tax

> liabilities, in order to deprive Plaintiff of property or legal rights or to otherwise cause injury.
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> Defendant's willful and malicious injury to Plaintiff subjected Plaintiff to unjust hardship in conscious disregard of her rights ….

Default Judgment at ¶¶ 2–17.

On June 13, 2022—prior to the State Court's entry of the Default Judgment—the Court entered a Memorandum of Decision [Doc. No. 23] (the "Memorandum") and accompanying order dismissing Plaintiff's claims under §§ 523(a)(2)(A), 727(a)(4)(A), and 727(a)(6) with prejudice, and dismissing Plaintiff's claim under § 727(a)(2)(A) with leave to amend. On June 28, 2022, Plaintiff filed a First Amended Complaint. Doc. No. 31.

In dismissing Plaintiff's § 523(a)(2)(A) claim with prejudice, the Court found that Plaintiff had failed to allege facts supporting a reasonable inference that Defendant never intended to repay the funds that Plaintiff loaned him:

> The Complaint alleges that Defendant repaid a substantial portion of the indebtedness owed under the Note. The original principal amount of the Note was $800,000. Including interest, the total amount owed under the Note when it came due for repayment three years after execution was $1,021,831. According to the Complaint, as of December 2018, Defendant paid back all but $171,853. That is, Defendant paid Plaintiff $849,978 of the $1,021,831 owed. Although Plaintiff did not receive all the interest that she was promised under the Note, she did receive a return of approximately 6% on her principal investment of $800,000.
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> To state a claim under § 523(a)(2)(A), Plaintiff must plausibly allege that at the inception of the financial relationship, Defendant knowingly made false representations to Plaintiff, for the purpose of inducing Plaintiff to extend credit. That is, Plaintiff would be required to allege facts showing that when Defendant told Plaintiff that she should invest with him, Defendant knew that he would be unable to repay the investment.
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> It is not plausible to infer that Defendant never intended to repay Plaintiff, when Defendant repaid approximately 83% of the amount owed under the Note. The most plausible inference from the Complaint's allegations is that Defendant fully intended to repay the Note at the time it was executed, but for whatever reason proved unable to do so.

Memorandum at 5.[3]

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[3] The approximately 6% return referenced in the Memorandum refers to the total return that Plaintiff received upon her investment, not the annualized return. The annualized return figure would be lower given that the funds were repaid over a period of several years.

B. Summary of Plaintiff's First Amended Complaint

In the First Amended Complaint (the "FAC"), Plaintiff objects to Defendant's discharge pursuant to § 727(a)(2)(A). The allegations of the First Amended Complaint may be summarized as follows:

> Defendant sold his nonexempt property located on 1561 Leland Street, Beamount, California (the "Beamount Property") in late March of 2021 for $408,200.00. FAC at ¶ 5. Defendant received net proceeds of $121,177.52 from the sale. *Id.* at ¶ 6.
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> In connection with a Rule 2004 Examination, Defendant provided to Plaintiff a spreadsheet itemizing pre-petition disbursements made by Defendant (the "Disbursement Statement"). Errata to FAC [Doc. No. 50]. The Disbursement Statement falsely stated that Defendant transferred $50,000 for "Family Support for Medical Emergency" on August 4, 2021. Errata to FAC and FAC at ¶ 8.
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> The $50,000 was not transferred to a family member, but was instead transferred to Defendant's wife's friend, who is not related to Defendant or his wife. FAC at ¶ 10. Defendant is not planning to be repaid for this $50,000. *Id.* at ¶ 11. The recipient of the $50,000 lives in China. *Id.* at ¶ 13. Defendant could not identify the transferee by name at the § 341(a) meeting of creditors or Rule 2004 Examination and did not produce any documents relating to the transferee. *Id.* at ¶ 14.

C. Summary of Papers Filed in Connection with Plaintiff's Motion for Leave to Amend

Plaintiff seeks leave to file a Second Amended Complaint for the purpose of adding a new claim under § 523(a)(6). Plaintiff argues that the proposed new § 523(a)(6) claim is warranted in view of the Default Judgment's finding that Defendant's conduct inflicted "willful and malicious injury to Plaintiff."

Defendant opposes Plaintiff's request for leave to amend. Relying upon the Memorandum's finding that the "most plausible inference from the Complaint's allegations is that Defendant fully intended to repay the Note at the time it was executed, but for whatever reason proved unable to do so," Defendant argues that "if it [is] not plausible to infer that Defendant never intended to repay Plaintiff, then it is also not plausible to infer that Defendant had either the subjective motive to harm Plaintiff at the time the contract was entered into or was substantially certain that harm would be caused, a required element of a Section 523(a)(6) claim." Doc. No. 58 at 6.

D. Summary of Papers Filed in Connection with Defendant's Motion to Dismiss

Defendant moves to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted. He argues that the First Amended Complaint fails to contain any allegations supporting a reasonable inference that Defendant's transfer of the $50,000 to a family friend was intended to hinder, delay, or defraud creditors.

Plaintiff opposes the Motion to Dismiss. She asserts that the disclosures in Defendant's petition regarding the transfer were inadequate, because Defendant described the transfer in his petition as a "medical emergency expense," rather than a transfer to a third party.

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II. Findings and Conclusions

A. The Motion for Leave to Amend is Denied

Under Civil Rule 15, the "court should freely give leave [to amend] when justice so requires." Courts within the Ninth Circuit consider "the following five factors to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013), *aff'd sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015) (internal citations and internal quotations omitted). Here, factors two, three, four, and five weigh against granting Plaintiff leave to amend. The fourth factor—futility of amendment—is the most salient within the context of this case and is discussed first.

1. Futility of Amendment

Plaintiff seeks leave to amend to add a claim under § 523(a)(6). Plaintiff argues that the Default Judgment's finding that Defendant subjected Plaintiff to "willful and malicious injury" warrants the addition of a § 523(a)(6) claim.

Except for the State Court's entry of the Default Judgment, no additional factual allegations have been added to Plaintiff's proposed Second Amended Complaint. That is, the proposed Second Amended Complaint is still predicated upon Defendant's failure to fully repay to Plaintiff all of the interest that came due under the Note. There is no dispute that Plaintiff was repaid *all* of the principal amount owed under the Note as well as $49,978 in interest. The Default Judgment merely establishes as fact what was alleged in Plaintiff's initial Complaint—namely, (1) that the principal amount due under the Note was $800,000; (2) that the amount of interest due under the Note was $221,831; (3) that Defendant repaid the full $800,000 in principal plus $49,798 in interest; and (4) that the amount of interest Defendant failed to repay amounted to $172,033.

Whether a debt is excepted from discharge under § 523(a)(6) is governed by federal law. The phrase "willful and malicious injury," as used in § 523(a)(6), has a specific meaning governed by federal law. Therefore, the fact that the Default Judgment uses the phrase "willful and malicious injury" does not necessarily mean that the proposed Second Amended Complaint states a claim under § 523(a)(6).

"Section 523(a)(6) excepts from discharge debts arising from a debtor's 'willful and malicious' injury to another person or to the property of another. The 'willful' and "malicious' requirements are conjunctive and subject to separate analysis." *Plyam v. Precision Development, LLC (In re Plyam)*, 530 B.R. 456, 463 (9th Cir. B.A.P. 2015) (internal citations omitted).

An injury is "willful" when "a debtor harbors 'either subjective intent to harm, or a subjective belief that harm is substantially certain.' The injury must be deliberate or intentional, 'not merely a deliberate or intentional act that leads to injury.'" *Id.* at 463 (internal citations omitted). When determining intent, there is a presumption that the debtor knows the natural consequences of his actions. *Ormsby v. First Am. Title Co. of Nevada (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). An injury is "malicious" if it "involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146–47 (9th Cir. 2002) (internal citations omitted). "Within the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005).

In *Plyam*, a state court jury found that the debtors "acted with malice, oppression, or fraud," and entered a judgment against the debtors of $10,100,000 in general damages and $200,000 in punitive damages. *Plyam*, 530 B.R. at 460. The *Plyam* court found that the judgment entered by the state court did *not* preclude the debtors from contesting their liability under § 523(a)(6). *Id.* at 465–71. The court concluded that the state court could have awarded punitive damages against the debtors *without* finding that they had acted with the state of mind necessary to support dischargeability under § 523(a)(6). *Id.* The reason, the *Plyam* court explained, was that "willfulness" for purposes of § 523(a)(6) requires an intent to cause injury, whereas punitive damages may be awarded under California law against a defendant who does *not* intend to cause injury—including, for example, a defendant who "acts in conscious disregard of another's rights or safety," a state of mind that would *not* support dischargeability under § 523(a)(6). *Id.* at 465.

The *Plyam* court's holding regarding the meaning of "willfulness" for purposes of § 523(a)(6) was rendered in connection with a determination as to whether the underlying state court judgment was entitled to preclusive effect. Although the issue of the definition of "willfulness" arises in a different procedural context in the instant case, *Plyam*'s holding still applies with equal force. Here, the Court must determine whether proposed Second Amended Complaint states a claim under § 523(a)(6) given the Default Judgment's finding that "Defendant intentionally, willfully, and maliciously misrepresented, deceived, or concealed a material fact he knew that he had no investment company, that he had no intent to pay 8.5% interest, and that he had no intent to pay and indemnify Plaintiff tax liabilities, in order to deprive Plaintiff of property or legal rights or to otherwise cause injury." Default Judgment at ¶ 13.

Notwithstanding the findings in the Default Judgment, the Court finds that the proposed Second Amended Complaint fails to plausibly allege that Defendant inflicted willful and malicious injury upon Plaintiff by failing to repay the full amount of interest owed under the Note. For purposes of § 523(a)(6), the terms "willful" and "malicious" have a specialized meaning that reflects the "exacting requirement[s]" that must be met to except debt from discharge. *Plyam*, 530 B.R. at 463. The Default Judgment's use of these terms cannot support dischargeability under § 523(a)(6) unless it is clear that the State Court intended that the terms be accorded the specialized meaning that they have under § 523(a)(6). Here, it is not plausible to conclude that by using the terms "willful" and "malicious," the State Court intended to find that Defendant had engaged in the type of conduct that would make the Default Judgment non-dischargeable under § 523(a)(6).

The Default Judgment was based upon the following four causes of action: (1) money due on default on note, (2) fraud, (3) negligent misrepresentation, and (4) unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq*. It is only with respect to the fraud cause of action that the findings that the State Court would have been required to make to enter default judgment could have also possibly supported a non-dischargeability claim under § 523(a)(6). But although it is conceivable that in certain circumstances a default judgment for fraud could lend support to a § 523(a)(6) claim, here there is no indication that the State Court made the requisite findings to support such a claim.

"The elements of fraud … are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638, 909 P.2d 981, 984–85 (Cal. 1996). Although a determination that a defendant engaged in fraud requires a finding that the defendant intended to defraud, it does *not* require a finding that the defendant intended to cause the injury resulting from the fraud. *See, e.g.*, *Lovejoy v.*

AT&T Corp., 119 Cal. App. 4th 151, 161, 14 Cal. Rptr. 3d 117, 124 (Cal. 2004) (rejecting "the contention that in a fraud cause of action it is necessary the defendant intend to cause the plaintiff to suffer particular damage"). Therefore, without more, a determination that a defendant engaged in fraud is not enough to support a determination of non-dischargeability under § 523(a)(6). *See Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998) (stating that "nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury").

Significantly, the State Court did *not* find that Defendant engaged in the type of fraud necessary to support an award of punitive damages.[4] The fraud necessary to support an award of punitive damages requires a more culpable state of mind than the fraud that Defendant was found liable for in the Default Judgment. For purposes of punitive damages, fraud means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code § 3294(c)(3). As opposed to garden variety fraud, the fraud necessary to justify an award of punitive damages requires that the plaintiff intend to cause injury to the defendant; such fraud can therefore satisfy the § 523(a)(6) willfulness requirement. *Plyam*, 530 B.R. at 465.

Because the State Court did *not* award Plaintiff punitive damages, there is no indication that the State Court found that Defendant intended to inflict upon Plaintiff the injury resulting from Defendant's fraud. As discussed, to find that the Defendant was liable for garden variety fraud, the State Court would *not* have been required to find that Defendant intended to injure Plaintiff. Although it is clear from the Default Judgment that the State Court found that Defendant intended to misrepresent, deceive, and conceal material facts from Plaintiff, nothing in the Default Judgment shows that the State Court found that by engaging in the misrepresentation, deception, and concealment, Defendant also intended to inflict injury upon Plaintiff.

As discussed above, in the Default Judgment, the State Court found (1) that Plaintiff loaned Defendant $800,000; (2) that Defendant repaid the full $800,000, but did not repay in full the accrued interest of $221,831; and (3) that of the interest due, Defendant repaid $49,798, leaving an unpaid balance of $172,033. These findings, without more, fail to support a plausible allegation that Defendant engaged in the type of willful and malicious conduct necessary to support a claim for relief under § 523(a)(6). Because there is no indication that the State Court found that Defendant intended to inflict injury upon Plaintiff, the Court finds that the proposed Second Amended Complaint fails to state a claim under § 523(a)(6).

2. Undue Delay, Prejudice to the Opposing Party, and Multiple Amendments

Plaintiff's undue delay in seeking to add the proposed § 523(a)(6) claim supports denying leave to amend. Although the State Court Complaint had been pending for more than two years at the time Plaintiff filed her initial Complaint, that initial Complaint did not assert a claim under § 523(a)(6). The First Amended Complaint, filed on June 28, 2022, was likewise devoid of a claim under § 523(a)(6). Plaintiff's § 523(a)(6) claim appears for the first time in the proposed Second Amended Complaint.

Plaintiff had knowledge of the relevant facts from the inception of the litigation. The proposed Second Amended Complaint attempts to assert a new theory of liability based upon

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[4] As set forth above, Plaintiff dismissed her request for punitive damages on August 20, 2021. Doc. No. 58, Ex. 2.

previously-known facts. "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016–17 (9th Cir. 1999).

Allowing Plaintiff a third crack at the Complaint would also prejudice Defendant, who has already incurred the costs of bringing a motion to dismiss the initial Complaint as well as a motion to dismiss the First Amended Complaint.

Finally, the Court has already permitted Plaintiff to amend the Complaint once (factor five). This is not an especially complicated case. Plaintiff should have been able to cure the defects in the initial Complaint in the First Amended Complaint. Plaintiff has not demonstrated that she should be afforded yet another opportunity to amend the Complaint.

B. The Motion to Dismiss is Denied

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To state a plausible claim for relief, a complaint must satisfy two working principles:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice…. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. (citing Civil Rule 8(a)(2)).

Although the pleading standard Civil Rule 8 announces "does not require 'detailed factual allegations,' … it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation…. A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Under § 727(a)(2)(A), a discharge may be denied where "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition."

"A party seeking denial of discharge under § 727(a)(2) must prove two things: '(1) a disposition of property, such as transfer or concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act [of] disposing of the property.' A debtor's intent need not be fraudulent to meet the requirements of § 727(a)(2). Because the

language of the statute is in the disjunctive it is sufficient if the debtor's intent is to hinder or delay a creditor." *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1200 (9th Cir. 2010) (internal citations omitted).

Retz illustrates the type of conduct that is actionable under § 727(a)(2)(A). In that case, the debtor transferred property to his brother for significantly less than the property's appraised value. *Id.* at 1201. The transfer occurred while the debtor was involved in state court litigation with one of his most significant creditors, and the debtor was in poor financial condition at the time of the transfer. *Id.*

Here, the First Amended Complaint alleges that Defendant transferred $50,000 to a friend of his wife who lives in China during the six-month period prior to the Petition Date; that Defendant failed to produce any documents relating to the transfer at a Rule 2004 Examination; and that Defendant could not identify the name of the transferee at the Rule 2004 Examination. These allegations support a reasonable inference that Defendant transferred the funds for the purpose of hindering, delaying, and defrauding creditors. The First Amended Complaint states a claim under § 727(a)(2)(A).

C. Litigation Deadlines

The following litigation deadlines shall apply:

1) Defendant shall file an Answer to the First Amended Complaint by no later than **October 21, 2022**.
2) The last day to disclose expert witnesses and expert witness reports is **11/29/2022**.
3) The last day to disclose rebuttal expert witnesses and rebuttal expert witness reports is **12/29/2022**.
4) The last date to complete discovery, including discovery pertaining to expert witnesses, is **1/24/2023**. All discovery motions must also have been heard by this date.[5]
5) The last day for dispositive motions to be heard is **1/24/2023**.[6]
6) A Pretrial Conference is set for **2/14/2023 at 11:00 a.m.** By no later than fourteen days prior to the Pretrial Conference, the parties must submit a Joint Pretrial Stipulation via the Court's Lodged Order Upload (LOU) system. Submission via LOU allows the Court to edit the Joint Pretrial Stipulation, if necessary. Information about LOU is available at https://www.cacb.uscourts.gov/the-central-guide/orders-judgments-electronic-lodging-attorneys-lou.
7) In addition to the procedures set forth in Local Bankruptcy Rule 7016-1(b), the following procedures govern the conduct of the Pretrial Conference and the preparation of the Pretrial Stipulation:
   a) By no later than thirty days prior to the Pretrial Conference, the parties must exchange copies of all exhibits which each party intends to introduce into evidence (other than exhibits to be used solely for impeachment or rebuttal).

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[5] For contemplated hearings on discovery motions, it is counsel's responsibility to check the Judge's self-calendaring dates, posted on the Court's website. If the discovery cutoff date falls on a date when the court is closed or that is not available for self-calendaring, the deadline for hearings on discovery motions is the next closest previous date which is available for self-calendaring.
[6] If the motion cutoff date is not available for self-calendaring, the deadline for dispositive motions to be heard is the next closest previous date which is available for self-calendaring.

b) When preparing the Pretrial Stipulation, all parties shall stipulate to the admissibility of exhibits whenever possible. In the event any party cannot stipulate to the admissibility of an exhibit, that party must file a Motion in Limine which clearly identifies each exhibit alleged to be inadmissible and/or prejudicial. The moving party must set the Motion in Limine for hearing at the same time as the Pretrial Conference; notice and service of the Motion shall be governed by LBR 9013-1. The Motion in Limine must contain a statement of the specific prejudice that will be suffered by the moving party if the Motion is not granted. The Motion must be supported by a memorandum of points and authorities containing citations to the applicable Federal Rules of Evidence, relevant caselaw, and other legal authority. Blanket or boilerplate evidentiary objections not accompanied by detailed supporting argument are prohibited, will be summarily overruled, and may subject the moving party to sanctions.

c) The failure of a party to file a Motion in Limine complying with the requirements of subparagraph (b) shall be deemed a waiver of any objections to the admissibility of an exhibit.

d) Motions in Limine seeking to exclude testimony to be offered by any witness shall comply with the requirements set forth in subparagraph (b), and shall be filed by the deadline specified in subparagraph (b). The failure of a party to file a Motion in Limine shall be deemed a waiver of any objections to the admissibility of a witness's testimony.

8) Trial is set for the week of **2/27/2023**. The trial day commences at 9:00 a.m. The exact date of the trial will be set at the Pretrial Conference. Consult the Court's website for the Judge's requirements regarding exhibit binders and trial briefs.

9) The matter shall be referred to the Mediation Panel. The parties shall meet and confer and select a Mediator. The parties may select either a Mediator from the District's Mediation Panel or a private Mediator. By no later than **October 21, 2022**, Plaintiff shall lodge a completed "Request for Assignment to Mediation Program; [Proposed] Order Thereon" (*see* Amended General Order 95-01 available on the Court's website). The manner in which the mediation is conducted (whether by videoconference or in-person) shall be at the discretion of the Mediator. The Court understands that settling a § 727 action can be more difficult than settling a § 523 action. Nonetheless, the Court believes that mediation still has the potential to be productive. For example, a potential settlement could involve dismissal of the action in exchange for a non-dischargeable judgment for a sum certain against Defendant.

10) The Status Conference is **CONTINUED** from October 11, 2022 at 10:00 a.m. to **January 10, 2023 at 10:00 a.m.** A Joint Status Report, which shall discuss the results of the mediation conference, shall be submitted by no later than fourteen days prior to the hearing.

11) Parties may appear at continued Status Conference either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

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III. Conclusion

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

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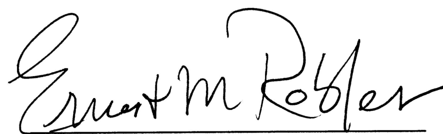
Date: October 7, 2022



Ernest M. Robles
United States Bankruptcy Judge