

FILED & ENTERED

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CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RIVERSIDE DIVISION

In re:

Joe Paul DiBenedetto,  
aka Joseph P Di Benedetto  
aw Jalx Inc. dba Crème De La  
Crème Bakery,

Debtor(s).

Case No.: 6:15-bk-16487-MJ

Chapter 7

Adv No: 6:15-ap-01272-MJ

**MEMORANDUM OF DECISION RE  
PLAINTIFF'S MOTION TO AMEND  
COMPLAINT**

Frontier Homes, LLC, a  
California limited liability  
company,

Plaintiff(s),

v.

Joe Paul DiBenedetto, aka  
Joseph P.  
DiBenedetto, an individual,

Defendant(s).

Date: August 11, 2016

Time: 10:00 AM

Place: Courtroom 301

Submission Date: September 8, 2016

Plaintiff Frontier Homes, LLC, filed a motion to amend its

1 complaint for nondischargeability of debt against debtor Joe  
2 Paul DiBenedetto on July 21, 2016, which was opposed by debtor  
3 and heard by the court on August 11, 2016. At the hearing, the  
4 court announced its tentative decision to deny the amendment for  
5 futility on two separate grounds: first, because the claim for  
6 relief which Frontier wished to assert in the amended complaint  
7 was barred by the applicable state law statute of limitations  
8 for the tort claim of malicious prosecution, as required by  
9 Lockerby v Sierra, 535 F. 3d 1038 (9<sup>th</sup> Cir. 2008); and second,  
10 because the amendment stated an entirely new claim for relief  
11 which was untimely per the bar date established by Rule 4007(c).<sup>1</sup>  
12

14 Frontier argued against the court's tentative ruling, in  
15 part because the application of Lockerby referenced in the  
16 court's decision had not been briefed by the parties. For that  
17 reason, the court allowed the parties to present supplemental  
18 briefs on that issue, with Frontier's brief due on August 25,  
19 2016, and any further opposition from debtor due on September 8,  
20 2016, with both briefs being at the option of the party.  
21 Frontier filed its supplemental brief timely; debtor did not file  
22 any further papers. The matter is now ready for decision.  
23

25 As discussed below, Frontier's supplemental brief was  
26 correct that the strict application of Lockerby would not create  
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<sup>1</sup> Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

1 a statute of limitations bar to the filing of a  
2 nondischargeability action where a debt was established as the  
3 result of an affirmative action filed by the creditor/plaintiff  
4 in state court prior to the bankruptcy. However, under the  
5 facts of this case, where the "debt" which the amended complaint  
6 seeks to establish as nondischargeable was awarded to Frontier  
7 as a defendant under a fee shifting statute in the California  
8 Labor Code, the court still rules that amendment to the  
9 complaint is untimely under the state statute of limitations for  
10 prosecution of a malicious prosecution action and therefore is  
11 futile. Moreover, because the proposed amendment not only  
12 states a new ground for § 523(a)(6)nondischargeability  
13 (malicious prosecution), but also is based on an entirely  
14 different factual nexus than that involved with the ground  
15 initially asserted for nondischargeability (defamation), the  
16 amendment violates the bar set by Rule 4007(c) and the amendment  
17 is futile for that additional reason. The motion is denied. The  
18 reasons for the court's ruling are set forth below; this  
19 memorandum shall constitute the court's findings of fact and  
20 conclusions of law as allowed by Rule 7052.  
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**BACKGROUND<sup>2</sup>**

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<sup>2</sup> The court has drawn from the Award issued in the American Arbitration Association proceeding as well as the allegations in the original complaint for much of the factual background.

1 Debtor was employed as Chief Financial Officer of Frontier  
2 under an at will contract in September 2003. During the course  
3 of his employment, Frontier learned that debtor had been  
4 involved in a civil action for embezzlement at a previous job,  
5 litigation not fully disclosed by debtor when he applied for the  
6 job. After that litigation was settled, criminal charges were  
7 filed against debtor, to which he pled guilty, resulting in  
8 probation with conditions. In 2005 Frontier was trying to  
9 expand its business through the issuance and public sale of  
10 corporate bonds which required an audit by a recognized  
11 accounting firm. This accounting firm, Ernst & Young, would not  
12 perform the audit so long as debtor was CFO. As a result,  
13 debtor's job title was changed to Corporate Controller in the  
14 spring of 2005.

15 Debtor's job performance was spotty at best. Although he  
16 had the training and talent to perform adequately, he often did  
17 not do so, arriving late at work, taking care of private  
18 business on company time, and being inattentive to the company's  
19 needs. Several corporate officers and managers urged Jimmy  
20 Previti, the company President, to terminate debtor, which  
21 Previti was at first reluctant to do. Performance evaluations  
22 of debtor showed negative reviews and by the fall of 2005, he  
23 saw "the handwriting on the wall" and began telling co-workers  
24 that he was going to hold on until January 2006 to get his last

1 bonus check and would sue Frontier if they fired him. His  
2 attendance became even more erratic in December and by  
3 approximately December 8 or 9, 2005, the company decided to  
4 terminate him. Notice of that termination was accomplished by a  
5 Federal Express message left at his home sometime in December.  
6 In April 2006, debtor contacted the auditors and falsely advised  
7 them that Frontier was the defendant in six civil actions,  
8 including one for sexual harassment against Previti.  
9

10 True to his word, in January 2006 debtor filed an action in  
11 San Bernardino Superior Court for wrongful termination and  
12 California Labor Code violations. The court ordered the matter  
13 to arbitration under the arbitration provisions in debtor's  
14 employment contract. Debtor's claim initiating the arbitration  
15 was based on the Superior Court complaint. Frontier filed a  
16 cross claim for defamation based on the false reporting to the  
17 auditors described above. The arbitration took place in July  
18 2007 and resulted in an Interim Award from the arbitrator dated  
19 September 18, 2007. The Interim Award found against debtor on  
20 all of his claims and in favor of Frontier on its defamation  
21 claim, awarding it \$15,000 in actual damages and \$120,000 in  
22 punitive damages. The Interim Award also stated that the  
23 arbitrator would consider a fee shifting motion from Frontier  
24 under California Labor Code § 218.5 and invited such motion.  
25 Frontier filed the motion, which resulted in an award of  
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1 \$327,351 for attorney's fees and expenses.

2 Based on the findings and conclusion in the Interim Award,  
3 the arbitrator issued a Final Award with damages and fees as  
4 found. On April 14, 2008, the San Bernardino Superior Court  
5 confirmed the arbitration award and entered judgment against the  
6 debtor for \$15,000 in compensatory damages, \$120,000 in punitive  
7 damages, and \$327,351 in attorney's fees awarded under Labor  
8 Code § 218.5. This judgment was timely renewed, with interest  
9 added at the state legal rate.  
10

11  
12 On June 26, 2015, debtor filed a chapter 7 petition and  
13 listed the judgment debt to Frontier in Schedule F. Frontier  
14 filed a timely complaint for nondischargeability, alleging that  
15 the entire amount of the judgment was excepted from discharge  
16 under the willful and malicious grounds found in § 523(a) (6).  
17 The complaint repeated many of the factual findings made in the  
18 Interim Award but sought relief only under the charging  
19 allegations in paragraphs 37 and 38:  
20

21 37. Based on the allegations, the Debtor willfully,  
22 maliciously, and intentionally injured Frontier by  
23 making false and defamatory statements about Frontier  
24 to its auditor, Ernst & Young.

25 38. Based on the foregoing, Frontier's judgment  
26 against the Debtor should be excepted from the  
27 Debtor's discharge in this case pursuant to section  
28

523(a)96) of the Bankruptcy Code.

As scheduled by the court, the parties filed cross motions for Summary Judgment, heard on June 16, 2016. Relying on issue preclusion, Frontier asserted the entire judgment was excepted from discharge under § 523(a) (6), arguing that the factual findings of the arbitrator in the Interim Award established the necessary elements for a willful and malicious injury under the standards developed by the caselaw, in particular Kawaauhau v Geiger, 523 U.S. 57, 61 (1998) and Carillo v Su (In re Su), 290 F. 3d 1140, 1146 (9<sup>th</sup> Cir. 2002). Debtor did not dispute that the compensatory damages and punitive damages based on the defamation findings were excepted from discharge, tacitly acknowledging that the defamation was willful and malicious and the resulting damages would not be discharged. However, debtor in his cross motion and in defense of Frontier's motion asserted that the attorney's fees were discharged because they were not awarded for the tortious conduct alleged in the cross claim, defamation, but rather were awarded under the fee shifting provisions of the Labor Code when Frontier, as defendant, prevailed on debtor's wrongful termination claims.

At the hearing, the court denied debtor's motion out of an abundance of caution, led to believe by Frontier that the attorney's fees might be a measure of damages under a claim for malicious prosecution, which Frontier asserted was supported by

1 the arbitrator's findings pled in the adversary complaint.<sup>3</sup> It  
2 granted Frontier's motion in part, as to the undisputed  
3 compensatory and punitive damages based on defamation, but  
4 denied it in part as to the attorney's fees. A colloquy took  
5 place in open court at the conclusion of that hearing during  
6 which the court said it would entertain Frontier's motion to  
7 amend its complaint to assert a claim which could deem the  
8 attorney's fees nondischargeable. The court did not opine on  
9 whether such motion could be granted. This motion for leave to  
10 amend followed.  
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13  
14 **Motion for Leave to Amend**

15 When Frontier filed its motion for leave to amend on July  
16 21, 2016, it argued that it was not adding a new claim, but  
17 rather was only seeking to "clarify" its original claim so that  
18 it would be clear it was always seeking damages for malicious  
19 prosecution. It argued that because the original complaint had  
20 included factual findings from the Interim Award, criticizing  
21 the behavior of the debtor in filing the wrongful termination  
22 lawsuit in the first place, malicious prosecution had really  
23 been pled from the beginning. In making these arguments,  
24 Frontier brushed over the comments of the court at the Summary  
25  
26  
27

28 <sup>3</sup> The first time the court became aware of the malicious prosecution claim was in the reply papers filed by Frontier for its Summary Judgment motion. In retrospect, the court should have granted debtor's summary judgment motion.



1 Judgment hearing after its attention had been directed to  
2 paragraphs 37 and 38. The court had already found that these  
3 operative paragraphs of the complaint, which sought relief only  
4 for defamation, were inadequate to support a malicious  
5 prosecution ground for relief.  
6

7 The motion discussed the factors to be considered by the  
8 court on a motion for leave to amend under Rule 15, as those  
9 factors had been delineated in Foman v Davis, 371 U.S. 178, 182  
10 (1962). The factors to be considered in determining the  
11 propriety of a motion for leave to amend are (1) bad faith, (2)  
12 undue delay, (3) prejudice to the opposing party, and (4)  
13 futility of amendment. Frontier submitted there was no showing  
14 of bad faith; the delay was short since it only learned of its  
15 need to amend at the Summary Judgment hearing; the debtor was  
16 not prejudiced because the allegations in the original complaint  
17 from the arbitrator's Interim Award put the debtor on notice  
18 that Frontier was seeking damages for malicious prosecution; and  
19 because the claim was a valid amendment, it was not futile.  
20  
21

22 The debtor's opposition concentrated on the futility  
23 element, asserting that since Frontier had not pursued a claim  
24 for malicious prosecution in state court after the arbitration  
25 proceeding had been decided in its favor, the state statute of  
26 limitations had long passed. The debtor emphasized that because  
27 the state law tort of malicious prosecution could not have been  
28

1 and was not tried at the arbitration, Frontier was now barred  
2 from asserting it for the first time in the bankruptcy court.  
3 The debtor also asserted he was prejudiced because Frontier  
4 employed a tactical litigation strategy to pursue  
5 nondischargeability only on the claim for which it could seek  
6 issue preclusion - the defamation claim - and now he must  
7 prepare for a totally new claim and new trial on different  
8 facts.<sup>4</sup>

9  
10 In its reply, Frontier argued again that because the  
11 factual findings of the arbitrator about the debtor's bad  
12 motives in filing the wrongful termination action had been  
13 alleged in the complaint, it did not need to assert a new claim  
14 for malicious prosecution; it only needed to show that the  
15 judgment it had obtained was a result of willful and malicious  
16 conduct by the debtor. Frontier specifically asserted that it  
17 did not need to prove the elements of malicious prosecution; the  
18 arbitrator's findings were sufficient to show willful and  
19 malicious behavior.

20  
21 It was this assertion by Frontier in its reply that caused  
22 this court to focus on the holding of Lockerby: in order to  
23 assert an exception to discharge under § 523(a)(6) plaintiff  
24 must plead and prove a state law tort. Frontier had argued to

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27 <sup>4</sup> The debtor also asserted that Frontier was barred by judicial estoppel from bringing a new claim. The court  
28 rejected that argument out of hand because it had not adopted a prior inconsistent position of Frontier in making  
a final decision. An alternative theory for relief is not an inconsistent position and no final decision had been  
rendered. This memorandum will not discuss judicial estoppel further.

1 the contrary in its reply. However, in its supplemental brief,  
2 Frontier implicitly conceded that Lockerby did require it to  
3 plead and prove the state law tort of malicious prosecution.  
4 Accordingly, it shifted its argument to argue why pleading this  
5 new claim was not timed barred. As a consequence, this court's  
6 review of the applicable authorities has expanded, as discussed  
7 below. The outcome, however, remains the same.

### 8 9 10 11 Legal Analyses

#### 12 1. State law statute of limitations

13  
14 Rule 7015 (incorporating FR Civ P 15) provides that a party  
15 may amend its pleading only by leave of court or by written  
16 consent of the adverse party and that leave shall be freely  
17 given when justice so requires. The Ninth Circuit has  
18 instructed that the policy favoring amendments "is to be applied  
19 with extreme liberality." Morongo Band of Mission Indians v  
20 Rose, 893 F. 2d 1074, 1079 (9<sup>th</sup> Cir. 1990).

21  
22 The factors to be considered to determine the propriety of  
23 a motion for leave to amend are (a) bad faith, (b) undue delay,  
24 (c) prejudice to the opposing party, and (4) futility of  
25 amendment. Foman, 371 U.S. at 182. Because the court decides  
26 this motion on the fourth factor only, futility, the other  
27 factors need not be discussed in this analysis.  
28

1 Futility alone is sufficient to deny leave to amend. Nunes  
2 v Ashcroft, 375 F. 3d 805, 808 (9<sup>th</sup> Cir. 2003). Where the legal  
3 basis for a claim for relief is tenuous, such that a motion to  
4 dismiss would be granted, futility supports the refusal to grant  
5 leave to amend. Id.  
6

7 As a preliminary matter, as noted above the court does not  
8 consider the proposed amended complaint to be a mere  
9 "clarification" of the original complaint. Very specifically,  
10 the tort pled to support nondischargeability under § 523(a) (6),  
11 as required by Lockerby, is set forth in paragraphs 37 and 38,  
12 the tort of defamation. Frontier now seeks to assert a new  
13 tort, that of malicious prosecution, as a means of establishing  
14 that the award of attorney's fees is also nondischargeable,  
15 despite the fact the fees were awarded because Frontier  
16 prevailed as the *defendant* on the wrongful termination claims.  
17 Accordingly, the court must first focus on whether assertion of  
18 this new claim is time barred by the state statute of  
19 limitations set forth in Cal. Code of Civ. Pro. § 340, which is  
20 one year from the date of discovery. That time deadline would  
21 have expired sometime in 2009.  
22  
23  
24

25 Frontier asserts that under Brown v Felsen, 442 U.S. 127  
26 (1979), Lockerby, and other Ninth Circuit authorities discussed  
27 below, a plaintiff in a bankruptcy adversary proceeding to  
28 except a debt from discharge need only have "established the

1 debt" under state law prior to the bankruptcy; only the  
2 dischargeability of the debt need be determined by the  
3 bankruptcy court. This is a correct statement of the general  
4 law. The Ninth Circuit has adopted the "McKendry test" from the  
5 10th circuit, so the Court's discussion begins with that case.  
6

7 The 10th Circuit in Resolution Trust Corp v McKendry (In re  
8 McKendry), 40 F. 3d 331 (10th Cir. 1994) determined that there  
9 are two distinct issues to consider in the dischargeability  
10 analysis: first, the establishment of the debt itself, which is  
11 subject to the applicable state statute of limitations; and,  
12 second, a determination as to the nature of that debt, an issue  
13 within the exclusive jurisdiction of the bankruptcy court and  
14 thus governed by Bankruptcy Rule 4007. Id. at 337, adopted by  
15 the Ninth Circuit in Lee-Benner v Gergely (In re Gergely), 110 F.  
16 3d 1448 (9th Cir. 1997) and Banks v Gill Distribution Centers,  
17 Inc. (In re Banks), 263 F. 3d 862 (2001). Whereas McKendry  
18 might have implied that the state court debt must be reduced to  
19 judgment, Banks clarified that was unnecessary:  
20  
21

22 The questions before us are whether the state court  
23 action was timely filed, and whether the filing of  
24 that action without reducing it to judgment, was  
25 sufficient to establish a debt for purposes of the  
26 McKendry test. We hold that the state court action  
27 was timely filed and that it was sufficient to  
28

1 establish a debt for the purposes of the McKendry  
2 test....Nothing under the Bankruptcy Code requires a  
3 debt to have been reduced to a pre-petition state  
4 court judgment. Banks, 263 F. 3d at 868.

5  
6 If the attorney's fees part of the "debt" which Frontier  
7 seeks to be nondischargeable had been asserted by Frontier as a  
8 plaintiff in the non-bankruptcy proceeding, such as was the case  
9 in Lockerby, Gergely, Banks, Brown v Felsen, and McKendry, the  
10 issue of the state law statute of limitations would have been  
11 decided in Frontier's favor. However, this court sees a  
12 distinct difference between the attorney's fees award here and  
13 the "debts" which were at issue in those cases.

14  
15 The arbitrator tried two cases: (a) debtor's case which was  
16 based on the seven claims for relief in the Superior Court  
17 complaint asserting wrongful termination and violation of  
18 several provisions of the California Labor Code; and (b)  
19 Frontier's cross claim for defamation. The Interim Award set  
20 forth factual findings which supported that Frontier had not  
21 wrongfully terminated debtor and had committed no violations of  
22 the California Labor Code. It also delineated simple factual  
23 findings that debtor had defamed Frontier when he told the  
24 auditors that six civil cases were pending against it, one a  
25 sexual harassment claim against Previti. As damages for the  
26 defamation, the arbitrator awarded compensatory and punitive  
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1 damages. Based on the fee shifting provisions found in  
2 California Labor Code § 218.5 in effect in 2006, he awarded the  
3 attorney's fees to Frontier as *defendant* on debtor's failed  
4 claims.  
5

6 To award the attorney's fees to Frontier, no findings of  
7 wrongful conduct were required. Labor Code § 218.5 mandates fee  
8 awards to prevailing parties in a wage and hour lawsuit. The  
9 version of the code operative in 2006 provided:  
10

11 In any action brought for the nonpayment of wages,  
12 fringe benefits, or health and welfare or pension fund  
13 contributions, the court shall award reasonable  
14 attorney's fees and costs to the prevailing party if  
15 any party to the action requests attorney's fees and  
16 costs upon the initiation of the action.  
17

18 Because debtor had requested attorney's fees when he filed  
19 the Superior Court case, the reciprocity provision came into  
20 play; when Frontier defeated his claims, its right to fees was  
21 mandatory. In 2010 the statute was amended, effective July 1,  
22 2012, to add the following sentence:  
23

24 However, if the prevailing party in the court action  
25 is not an employee, attorney's fees and costs shall be  
26 awarded pursuant to this section only if the court  
27 finds that the employee brought the court action in  
28 bad faith.

1 Therefore, the award of fees to Frontier in 2006 was mandatory  
2 and did not imply that debtor had conducted his litigation in  
3 bad faith or with malice. Statements by the arbitrator in the  
4 Interim Award which implied otherwise were stray and unnecessary  
5 because they did not support any of the legal conclusions or  
6 awards of the arbitrator.  
7

8 In the cases cited above – which state that a state statute  
9 of limitations is not a bar to nondischargeability litigation  
10 where the debt was established prior to the filing of the  
11 bankruptcy petition – the debt they spoke of was for damages  
12 awarded to a plaintiff who had pursued an affirmative claim  
13 against the debtor arising from the same nexus of facts which  
14 later was being used to prove nondischargeability. In Brown v  
15 Felsen, the bankruptcy judgment creditor had cross claimed  
16 against the debtor based on indemnification for damages arising  
17 from a guarantee, which guarantee created the creditor's  
18 liability to a bank. Although the settlement which resolved  
19 that cross claim in the creditor's favor did not delineate the  
20 legal claim resolved by the judgment, the creditor was suing for  
21 fraud in the bankruptcy court based on the same factual nexus  
22 which resulted in the debt to him. Id. 442 U.S. at 129-130.  
23 In Lockerby, the debt asserted was based on a breach of contract  
24 claim and the issue before the court was whether the creditor  
25 could establish an intentional tort to support the exception  
26  
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1 from discharge of that same debt. Lockerby, 535 F. 3d at 1041.

2 Similarly, in Banks the creditor within the state statute  
3 of limitations had sued to establish the debt arising from the  
4 debtor's nonperformance of a settlement agreement and sought to  
5 find the debt arising from that nonperformance was  
6

7 nondischargeable in bankruptcy. Banks, 263 F. 3d at 866-867.

8 Recognizing the debt was the same as that arising from the  
9 affirmative actions of the creditor prepetition, the Banks court  
10 observed the creditor was not asserting a new ground for  
11 recovery, only that the recovery was not discharged. Finally,  
12 in Gergely as plaintiff the creditor had obtained a judgment for  
13 medical malpractice and wished to establish the same factual  
14 events encompassed fraud and an exception to discharge for that  
15 debt. Gergely, 110 F. 3d at 1453.  
16  
17

18 The debt Frontier attempts to assert is nondischargeable is  
19 the award of attorney's fees which it received as *defendant*, not  
20 because it filed a claim against the debtor in the arbitration.  
21 The entire concept of saving a state statute of limitations is  
22 inapposite here, since there is no statute involved in defending  
23 a lawsuit. In fact, the alleged factual basis for the claim  
24 here, malicious prosecution, did not even exist at the time the  
25 arbitration was prosecuted. A cause of action for malicious  
26 prosecution cannot arise under California law until the new  
27 plaintiff has been successful in defending prior litigation,  
28

1 here, the entry of judgment in its favor on the debtor's claims.  
2 What Frontier seeks to except from discharge in its proposed  
3 amended complaint is not the debt it established as plaintiff  
4 prior to bankruptcy (and therefore saved the state statute), but  
5 an entirely new debt which could be awarded only after the  
6 arbitration had concluded. Here, it is argued that a measure of  
7 damages for a victory on a malicious prosecution claim might  
8 well be those same attorney's fees;<sup>5</sup> this court finds such award  
9 is not the same "debt."  
10  
11

12 Because the debt was not preserved in the non-bankruptcy  
13 forum litigation, the one year statute of limitations for  
14 malicious prosecution ran long before this chapter 7 was filed.  
15 As such, amendment would only add a new claim which was  
16 timebarred. For this reason, the motion to amend is denied as  
17 futile.  
18

## 19 2. Bankruptcy Rule Time Bar

20 As discussed at length above, the timely filed adversary in  
21 this case asserted a claim for exception from discharge under §  
22 523(a)(6) for the state law tort of defamation. The proposed  
23 amended complaint seeks to assert a § 523(a)(6) claim based on  
24 the state law tort of malicious prosecution. Since this is an  
25 entirely new claim, only if this claim relates back to the claim  
26  
27

28 

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<sup>5</sup> The scope of a damage award for malicious prosecution has not been briefed and certainly was not argued in the arbitration.

1 in the original complaint will the adversary claim be timely  
2 under Rule 4007(c), which requires that § 523(a)(2), (4), or (6)  
3 complaints must be filed within 60 days of the initial date set  
4 for the § 341(a) meeting, in this case September 28, 2015.  
5

6 Whether an amended pleading will relate back to the date of  
7 an earlier filing is established by F.R.Civ.Pro 15(c)(1). The  
8 relation back doctrine of Rule 15 is a bar to the statute of  
9 limitations. Rural Fire Protection Co. v Hopp, 366 F. 2d 355,  
10 362 (9th Cir. 1966). A new claim asserted in an amended  
11 pleading "relates back" if it arises from the same "conduct,  
12 transaction, or occurrence" as the original claim. Dominguez v  
13 Miller (In re Dominguez), 51 F.3d 1502, 1509 (9<sup>th</sup> Cir. 1995). A  
14 key test for assessing the "same conduct, transaction or  
15 occurrence" standard is whether "the claim to be added will  
16 likely be proved by the 'same kind of evidence' offered in  
17 support of the original pleading." Id. at 1510 quoting Percy v  
18 San Francisco Gen. Hosp., 841 F. 2d 975, 978 (9<sup>th</sup> Cir. 1988).  
19  
20

21 Here, the amendment did not arise out of the conduct,  
22 transaction or occurrence originally pled because only  
23 defamation was pled and the malicious prosecution claim was  
24 based on an entirely different factual nexus. The facts related  
25 to the defamation were narrow: the debtor sent the letter about  
26 the nonexistent lawsuits to the auditor in April 2006. As noted  
27 above, facts which would support malicious prosecution are  
28

1 entirely different. This claim does not relate back.

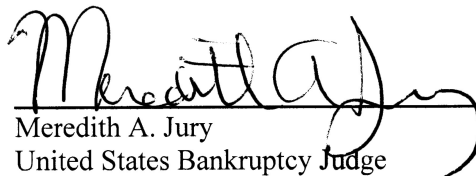
2 As a consequence, the claim for relief to be asserted in  
3 the amended complaint would be time barred by Rule 4007(c) and  
4 such amendment would be futile. The motion for leave to amend  
5 is denied on this additional ground.  
6

7 **Conclusion**

8 The motion for leave to amend is denied and the court will  
9 prepare an order to that effect. In the Summary Judgment  
10 rulings, the court concluded that only the compensatory damages  
11 and the punitive damages are excepted from discharge. No other  
12 affirmative relief can be awarded to Frontier. Therefore, after  
13 the denial order is entered, the court requests Frontier to  
14 submit a judgment in its favor for the allowed nondischargeable  
15 damages.  
16

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26  
27 Date: November 9, 2016  
28

  
Meredith A. Jury  
United States Bankruptcy Judge