

1 which is represented by attorney Charles Greene, opposes the
2 motion. The Court issued a tentative decision on February 26,
3 2014, and the parties argued the motion on February 27, 2014. This
4 memorandum decision clarifies portions of the Court's tentative
5 decision.

6 Under Fed. R. Civ. P. 12(b)(1), the court must dismiss a
7 complaint for lack of subject matter jurisdiction. Under Fed. R.
8 Civ. P. 12(b)(6), a court must dismiss a complaint if it fails to
9 state a claim upon which relief can be granted. To survive a Fed.
10 R. Civ. P. 12(b)(6) motion to dismiss, the plaintiff must allege
11 "enough facts to state a claim to relief that is plausible on its
12 face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).
13 This standard requires the plaintiff to allege facts that add up to
14 "more than a sheer possibility that a defendant has acted
15 unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
16 Plaintiff must provide "more than labels and conclusions, and a
17 formulaic recitation of the elements of a cause of action will not
18 do." Id.

19 In deciding whether the plaintiff has stated a claim upon
20 which relief can be granted, the Court must assume that the
21 plaintiff's allegations are true and must draw all reasonable
22 inferences in favor of the nonmoving party. Usher v. City of Los
23 Angeles, 828 F.2d 556, 561 (9th Cir. 1987).

24 Debtor filed a chapter 11 petition on September 11, 2013. At
25 the time of filing, Debtor was a plaintiff in litigation in Santa
26 Clara County Superior Court (the "State Court Action"). The
27 original complaint was filed on May 10, 2012. Plaintiffs filed a
28 First Amended Complaint ("FAC") on July 9, 2013. The FAC pleads

1 six causes of action: (1) breach of fiduciary duty and imposition
2 of a trust; (2) breach of contract; (3) accounting; (4) appointment
3 of a receiver or special master; (5) declaratory relief; (6)
4 injunctive relief; and (7) indemnity. Defendants filed a cross-
5 complaint for dissolution of the partnership. Debtor removed the
6 State Court Action to this Court on December 12, 2013.

7 Defendants move for dismissal of the FAC under Fed. R. Civ. P.
8 12(b)(1) for lack of subject matter jurisdiction. Alternatively,
9 Defendants move for dismissal of the third, fourth, sixth, and
10 seventh causes of action under Fed. R. Civ. P. 12(b)(6).

11

12 1. Lack of Subject Matter Jurisdiction

13 Defendants argue that this Court lacks subject matter
14 jurisdiction over the adversary proceeding because the state court
15 sustained Defendants' demurrer to the FAC by order entered on
16 September 6, 2013. Defendants' demurrer was based on the fact that
17 Plaintiffs had not complied with Cal. Prob. Code § 9351, which
18 provides that an action may not be commenced against a decedent's
19 personal representative on a cause of action against the decedent
20 unless a claim is first filed in probate court, and the claim is
21 rejected. The state court sustained the demurrer and granted 10
22 days' leave to amend.

23 The parties agree that the 10-day period to amend the
24 complaint would have expired on October 16, 2013 (calculated from
25 the date the notice of order was served, pursuant to Cal. Civ. Pro.
26 Code § 472b, plus mailing time, pursuant to Cal. Civ. Pro. Code
27 § 1013). As noted, Debtor filed its chapter 11 case on September
28

1 11, 2013, prior to the expiration of the time for amending the
2 complaint.

3 On October 17, 2013, Defendants' counsel, Andrew Watters, sent
4 a letter to the state court judge, Judge McKenney, notifying the
5 judge that the time for Plaintiffs to amend their complaint had
6 passed, and stating that "[t]he action is stayed as to Plaintiff
7 Sobarea Ranches LLC, which is in chapter 11 bankruptcy." The
8 letter requested that Judge McKenney dismiss the FAC as to
9 Plaintiff Gary Hansen only, on the ground that the action was not
10 stayed as to Mr. Hansen.¹ Judge McKenney did not sign the proposed
11 judgment dismissing Mr. Hansen, but rather drew a line across the
12 front of the proposed judgment with the notation "12-17-13 Case
13 stayed by bankruptcy."

14 Defendants contend that the automatic stay did not operate to
15 stay the litigation because Debtor is a plaintiff. Although
16 Defendants cite no case law, this contention is generally correct.
17 See, e.g., Brown v. Armstrong, 949 F.2d 1007, 1009-1010 (8th Cir.
18 1991). However, Defendants do not address the status of the cross-
19 complaint or whether the existence of a cross-complaint makes any
20 difference to their argument that the stay does not apply.

21 Alternatively, Defendants argue that under § 108(b) the Debtor
22 did not timely amend the FAC. That section provides:

23 (b) Except as provided in subsection (a) of this section,
24 if applicable nonbankruptcy law, an order entered in a
25 nonbankruptcy proceeding, or an agreement fixes a period
within which the debtor . . . may file any pleading,

26 ¹The copy of the letter filed with Debtor's opposition is not
27 signed or authenticated in a declaration, but Defendants
28 acknowledged in their reply, "[w]e are aware that Counsel for
Creditor on October 17, 2013, incorrectly stated in his
correspondence with Judge McKenney that the State Court litigation
is stayed with respect to the Debtor"

1 demand, notice, or proof of claim or loss, cure a
2 default, or perform any other similar act, and such
3 period has not expired before the date of the filing of
the petition, the trustee may only file, cure, or
perform, as the case may be, before the later of--

4 (1) the end of such period, including any suspension of
5 such period occurring on or after the commencement of the
case; or

6 (2) 60 days after the order for relief.

7 Regardless of whether the stay applied, the state court
8 treated the litigation as stayed, apparently in reliance upon
9 counsel's letter. Therefore, Defendants are judicially estopped
10 from arguing in this proceeding that the stay was not in effect.
11 In determining whether to apply judicial estoppel, courts are to
12 consider whether a party's later position is clearly inconsistent
13 with its earlier position; whether the party has succeeded in
14 persuading a court to accept that party's earlier position; and
15 whether the party seeking to assert the inconsistent position would
16 derive an unfair advantage or impose an unfair detriment on the
17 opposing party if not estopped. New Hampshire v. Maine, 532 U.S.
18 742, 749-50 (2001). The Court finds that all of these elements are
19 met. Defendants' position in this motion is clearly inconsistent
20 with its position taken in the letter to Judge McKenney. Further,
21 regardless of whether Defendants' counsel was mistaken in informing
22 Judge McKenney that the State Court Action was stayed by Debtor's
23 bankruptcy filing, Judge McKenney relied on that representation in
24 declining to dismiss the FAC. Finally, permitting Defendants to
25 take the position that the automatic stay did not operate to stay
26 the State Court Action would prejudice Debtor by precluding Debtor
27 from amending the FAC.

1 Section 108(b) does not dictate a different result, because
2 that statute provides that a pleading would need to be filed by the
3 deadline set by the court, "including any suspension of such period
4 occurring on or after the commencement of the case." Judge
5 McKenney implicitly suspended the deadline after being notified
6 that Debtor had filed bankruptcy.

7 The Court gives full faith and credit to the state court's
8 grant of Defendants' demurrer in the state court litigation.
9 However, Defendants' motion to dismiss on the ground that
10 Plaintiffs failed to timely amend their complaint is denied for the
11 reasons set forth above.

12
13 2. Failure to State a Claim

14 Alternatively, Defendants argue that the third, fourth and
15 sixth causes of action should be dismissed because those claims are
16 remedies rather than causes of action. The claims are,
17 respectively, for an accounting, for appointment of a receiver or
18 special master, and for an injunction. Defendants are correct that
19 these causes of action are remedies and, as such, are distinct from
20 causes of action. See Davis v. Passman, 442 U.S. 228, 239 (1979)
21 (whether a litigant has a cause of action is analytically distinct
22 and prior to the question of what relief a litigant may be entitled
23 to receive); Williams v. Walsh, 558 F.2d 667, 670-71 (2d Cir.
24 1977). The Court will grant the motion to dismiss these causes of
25 action but will grant leave to amend so that Plaintiffs may clarify
26 the bases for the remedies sought.

27 With respect to the seventh cause of action - for indemnity
28 against Dale Sobek for failure to file tax returns - Defendants

1 argue that this claim is not ripe for adjudication because
2 Plaintiffs have not yet suffered any damages. The elements of a
3 cause of action for indemnity under California law are: (1) a
4 showing of fault on the part of the indemnitor; and (2) resulting
5 damages to the indemnitee for which the indemnitor is equitably
6 responsible. Bailey v. Safeway, Inc., 199 Cal. App. 4th 206, 217
7 (2011). The FAC alleges that Mr. Sobek was the tax matters partner
8 of the LLC and was responsible for preparing tax returns, but did
9 not do so. The FAC further alleges that "[t]hroughout the term of
10 [Sobarea Ranches, LLC] Plaintiffs have incurred damages in an
11 unknown amount presently unknown and subject to proof at trial
12 arising from Dale Sobek's failure to perform his duties as [Sobarea
13 Ranches, LLC's] tax matters partner and from his false reporting of
14 [Sobarea Ranches, LLC's] losses[.]"

15 The Court finds that these allegations are sufficient to state
16 a cause of action for indemnity. A motion to dismiss under Fed. R.
17 Civ. P. 12(b)(6) tests only the sufficiency of the pleadings, and
18 all of the allegations in the complaint are accepted as true. The
19 FAC includes an allegation that Plaintiffs suffered damages.
20 Whether Plaintiffs can prove damages, and in what amount, is to be
21 determined upon submission of appropriate evidence, either at trial
22 or on summary judgment. Therefore, the motion is denied with
23 respect to this claim.

24 For the reasons stated above, the Court accepts the state
25 court's ruling sustaining Defendants' demurrer to the FAC but
26 denies the motion to dismiss on the basis that the complaint was
27 not timely amended. The Court denies the motion to dismiss the
28 seventh cause of action for indemnity under Fed. R. Civ. P.

1 12(b)(6). The Court grants Defendants' motion as to the third,
2 fourth, and sixth causes of action. Leave is granted to amend the
3 FAC. Plaintiffs may may file an amended complaint within 40 days
4 of the Court's ruling on Debtor's application to employ Judith
5 Rentschler as special counsel. Defendants' counsel shall submit a
6 proposed form of order.

7 ***** END OF MEMORANDUM DECISION *****

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All parties are ECF participants