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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

IN RE: VALLEY HEALTH SYSTEM, a California
Local Health Care District, Debtor,
Peggy Kirton; Diana Agnello, Appellants,
v.

Valley Health System; Valley Health System
Retirement Plan; Joel Bergenfeld, Trustee of the
Valley Health System Retirement Plan; Vinay M. Rao,
Trustee of the Valley Health System Retirement Plan;
Michele Bird, Trustee of the Valley Health System
Retirement Plan; Metropolitan Life Insurance
Company, Appellees.

No. 15-60023

Submitted September 1, 2017* Pasadena, California

Filed September 12, 2017

Appeal from the Ninth Circuit Bankruptcy Appellate
Panel Pappas, Dunn, and Taylor, Bankruptcy Judges,
Presiding, BAP No. 11-1100

Attorneys and Law Firms

Gregory Glenn Petersen, Attorney, Gregory G.
Petersen, Newport Coast, CA, for Appellants

Todd M. Arnold, Esquire, Attorney, Jacqueline L. James, Gary E. Klausner, Attorney, Levene, Neale, Bender, Yoo & Brill L.L.P., Los Angeles, CA, for Appellee Valley Health System

Mark R. Attwood, Attorney, Cynthia J. Emry, Jackson Lewis P.C., Los Angeles, CA, for Appellees Valley Health System Retirement Plan, Joel Bergenfeld, Vinay M. Rao, Michele Bird

Robert E. Hess, Attorney, Jenny H. Wang, Hinshaw & Culbertson LLP, Newport Beach, CA, for Appellee Metropolitan Life Insurance Company

Before: WARDLAW and BYBEE, Circuit Judges, and BARTLE,^{**} District Judge.

Opinion

MEMORANDUM^{***}

Peggy Kirton and Diana Agnello are former employees of the Debtor, Valley Health System (“VHS”). They appeal the Bankruptcy Appellate Panel's February 25, 2015 decision affirming dismissal of their petition. Our review is de novo. *See In re Tracht Gut LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016).

As former VHS employees, Kirton and Agnello are participants in the VHS Retirement Plan. After VHS declared bankruptcy, the bankruptcy court established the proof of claims bar date as August 25, 2008. The court then confirmed an adjustment plan on April 26, 2010 limiting participants such as Kirton and Agnello to the \$523 monies already in the Retirement Plan. Kirton and Agnello, who at all times had proper notice, neither filed a proof of claim by the claims bar date nor objected to the adjustment plan.

A creditor may not contest a plan if the creditor failed to object to the plan's proposal or confirmation. *See*

Miller v. United States, 363 F.3d 999, 1004 (9th Cir. 2004). Kirton and Agnello's petition clearly asserts prepetition claims, which are precluded by the claims bar date and discharged by the adjustment plan. Thus, the bankruptcy court did not err in dismissing their petition.

Courts should “freely give leave [to amend a pleading] when justice so requires,” Fed. R. Civ. P. 15(a)(2),¹ but should deny leave where the amendment would be futile, *see Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). A motion to amend should be denied if it is clear the amended pleading would not rectify the failure to state a claim. *See Kelson v. City of Springfield*, 767 F.2d 651, 656 (9th Cir. 1985). In light of the foregoing, the bankruptcy court did not err in dismissing Kirton and Agnello's petition without leave to amend.

We have considered appellants' other arguments and find them to be without merit. Appellants shall bear the costs of appeal. The order of the Bankruptcy Appellate Panel is **AFFIRMED**.

Footnotes

*The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2)*.

**The Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

***This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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¹*See* Fed. R. Bankr. P. 7015 (“Rule 15 F.R.Civ.P. applies in adversary proceedings.”).

United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re VALLEY HEALTH SYSTEM, Debtor.

Peggy Kirton; Diana Agnello, Appellants,

v.

Valley Health System; Valley Health System
Retirement Plan; Joel Bergenfeld, Trustee of the
Valley Health System Retirement Plan; Vinay M. Rao,
Trustee of the Valley Health System Retirement Plan;
Michele Bird, Trustee of the Valley Health System
Retirement Plan, Appellees.

BAP No. CC-11-1100-DPaTa.Bankruptcy No. 07-
18293.Adversary No. 10-01566.

Argued and Submitted on Jan. 22, 2015.Filed Feb. 24,
2015.

Appeal from the United States Bankruptcy Court for
the Central District of California, Honorable Peter
Carroll, Bankruptcy Judge, Presiding.

Attorneys and Law Firms

Gregory G. Petersen argued for Appellants, Peggy
Kirton and Diana Agnello.

Gary E. Klausner of Levene, Neale, Bender, Yoo &
Brill LLP argued for Appellee Valley Health System;
Mark R. Attwood of Jackson Lewis LLP argued for
Appellees Valley Health System Retirement Plan and
its trustees, Joel Bergenfeld, Vinay M. Rao, and
Michele Bird.

Before: DUNN, PAPPAS, and TAYLOR, Bankruptcy Judges.

Opinion

MEMORANDUM¹

This appeal is before us for a second time. On March 19, 2012 (“Prior Disposition”),² the Panel determined that the bankruptcy court lacked subject matter jurisdiction over the dispute between the parties. On further appeal to the Ninth Circuit Court of Appeals, that determination was reversed and remanded to this Panel to determine the remaining substantive issues posed on appeal from the bankruptcy court. *See Valley Health Sys. v. Kirton (In re Valley Health Sys.)*, 584 Fed.Appx. 477 (9th Cir.2014).

We restate the introduction to the appeal set forth in the Prior Disposition:

Peggy Kirton and Diana Agnello (“Kirton Parties”) are former employees of Valley Health System (“VHS”) and were participants in the Valley Health System Retirement Plan (“Retirement Plan”). After VHS confirmed its chapter 9³ plan of adjustment, they filed in state court a petition for writ of mandamus (“Petition”) against VHS and others seeking to enforce their alleged rights under the Retirement Plan. VHS removed the Petition to the bankruptcy court. Along with other named respondents, VHS then filed a Civil Rule 12(b)(6) motion to dismiss the Petition, which the bankruptcy court granted without leave to amend. The Kirton Parties filed a motion for reconsideration, which the bankruptcy court denied.

The Kirton Parties appeal from both the dismissal order and the order denying the motion for reconsideration.

For the reasons stated below, we AFFIRM the bankruptcy court's dismissal of the adversary proceeding.

I. FACTUAL BACKGROUND⁴

A. VHS Confirms a Chapter 9 Plan

VHS is a local health care district under the California Local Health Care District Law, Cal. Health & Safety Code § 32000 *et seq.* VHS filed a chapter 9 bankruptcy petition in December 2007, and the bankruptcy court entered an order for relief in the case in February 2008. Pursuant to § 943, the bankruptcy court confirmed VHS' first amended plan of adjustment ("Chapter 9 Plan") by order entered April 26, 2010 ("Confirmation Order"). On October 14, 2010, VHS issued a notice that October 13, 2010, was the effective date of the Chapter 9 Plan. Among other things, the Chapter 9 Plan provided for the discharge of VHS' prepetition debts and also enjoined claimants from pursuing any action or proceeding on account of such debts.

The underlying fact that has driven the litigation that is the subject of this appeal is that VHS, prepetition, allegedly had failed to fund the Retirement Plan adequately by at least \$100 million. The Chapter 9 Plan specifically addressed VHS' obligations under its Retirement Plan:

Defined Benefit Plan Participants will be entitled to the same rights and benefits to which such participants are currently entitled under the VHS Retirement Plan and the MetLife Group Annuity Contract, and such

participants shall have no recourse to the District or to any assets of the District, and shall not be entitled to receive any distributions under this Plan. Instead, all unallocated amounts held by MetLife Group, pursuant to the VHS Retirement Plan and the MetLife Group Annuity Contract, will continue to be made available to provide retirement benefits for participants in the manner indicated under the provisions of the VHS Retirement Plan and the MetLife Group Annuity Contract. Accordingly, the treatment of Allowed Class 2C claim holders set forth herein shall not affect any legal, equitable or contractual rights to which the VHS Retirement Plan participants are entitled.

Chapter 9 Plan (Dec. 17, 2009) at 16:13–22. Based on this treatment, Retirement Plan participants (Class 2C claimants) were characterized as unimpaired, with no entitlement to vote on the Chapter 9 Plan.

The Kirton Parties were served with notice of the claims bar date, bankruptcy court approval of the first amended disclosure statement, and the confirmation hearing on the Chapter 9 Plan. They also received copies of the Chapter 9 Plan and the first amended disclosure statement. The Kirton Parties filed no proofs of claim, did not object to confirmation of the Chapter 9 Plan, and otherwise did not participate in VHS' Chapter 9 case. They further did not appeal the Confirmation Order.

B. The Kirton Parties Seek Relief in State Court

In August 2010, after the Chapter 9 Plan had been confirmed, the Kirton Parties filed the state court Petition, naming as respondents VHS, the Retirement Plan, three individual trustees for the Retirement Plan,

and MetLife, Inc. (“MetLife”), the administrator of the Retirement Plan. The Petition sought damages in excess of \$100 million under various theories for the alleged underfunding of the Retirement Plan since 1999. The Petition's prayer for relief sought a writ of mandate directing the respondents to fund the Retirement Plan as required by law, to disclose VHS' underfunding and violations of the Retirement Plan and the California Constitution, to cease any concealment of underfunding/violations, and to prosecute any actions allowed or required to conserve the Retirement Plan's assets. The Petition alleged that all of the respondents had breached their respective duties to prevent, to disclose, or both, VHS' underfunding of the Retirement Plan, which were alleged to have arisen under the Retirement Plan itself and California Constitution Art. XVI, Sec. 17. However, ultimately, as noted in the Prior Disposition, “[t]he gravamen of the Petition was that VHS allegedly underfunded the Retirement Plan to the tune of \$100 million.” 471 B.R. at 560.

C. VHS Removes the State Court Petition to Bankruptcy Court

On September 22, 2010, VHS filed a notice of removal pursuant to 28 U.S.C. § 1452(a) and Rule 9027, which removed the Petition from state court to the bankruptcy court. VHS, the Retirement Plan, and its Trustees (“VHS Defendants”) then filed the motion (“Dismissal Motion”) to dismiss the Petition under Civil Rule 12(b)(6), applicable in the adversary proceeding pursuant to Rule 7012, on October 22, 2010.

The primary argument in the Dismissal Motion was that the Chapter 9 Plan and the Confirmation Order discharged VHS' obligation to fund the Retirement

Plan. In addition, the VHS Defendants argued that the Trustees had no contractual or fiduciary obligations to the Kirton Parties under the Retirement Plan; that the Retirement Plan did not have legal capacity to sue or be sued; that the Kirton Parties did not comply with the pre-filing requirements of the California Government Claims Act; that both VHS and the Trustees were immune from liability; and that the Kirton Parties failed to plead the requisite elements for mandamus relief or for relief under the causes of action alleged.

The notice which accompanied the Dismissal Motion warned the Kirton Parties that if they failed to file a timely opposition, the Local Rules authorized the bankruptcy court to treat that failure as consent to the relief requested in the Dismissal Motion. Notwithstanding that warning, the Kirton Parties never filed a response to the Dismissal Motion. On the eve of the January 4, 2011, hearing (“Hearing”) on the Dismissal Motion, the Kirton Parties instead filed what they intended to be an amended complaint.

At the Hearing, the bankruptcy court found that no valid amended complaint had in fact been filed; the Kirton Parties had failed to comply with Civil Rule 15, which required either written consent from the VHS Defendants or an order from the bankruptcy court in advance of filing an amended complaint, neither of which the Kirton Parties had obtained. In light of the Kirton Parties' failure to respond to the Dismissal Motion, the bankruptcy court granted the Dismissal Motion without leave to amend.

The Kirton Parties objected to the proposed dismissal order prepared by the VHS Defendants on the basis that it attempted to grant relief beyond that sought in the Dismissal Motion and to resolve matters not properly before the bankruptcy court. In particular, the

Kirton Parties asserted that granting the Dismissal Motion in favor of parties not expressly named as movants in the Dismissal Motion would violate the Kirton Parties' due process rights. In large part this argument seems to be directed to the Kirton Parties' assertions that VHS had more than one retirement plan and that the retirement plan named in their Petition was not the Retirement Plan on behalf of which the Dismissal Motion was filed. The Kirton Parties also asserted that the California Constitution deprived the bankruptcy court of jurisdiction over any retirement plan of VHS. The bankruptcy court overruled the Kirton Parties' objections and entered the form of order ("Dismissal Order") the VHS Defendants had lodged.

In response, the Kirton Parties filed a motion for reconsideration of the Dismissal Order, reiterating their arguments made against the form of order. The bankruptcy court entered a Memorandum of Decision ("Opinion") without a hearing with respect to reconsideration on February 24, 2011. In the Opinion, the bankruptcy court explicitly found that "VHS had only one retirement plan—the VHS Retirement Plan identified in VHS's disclosure Statement." The bankruptcy court also rejected the Kirton Parties' theory that the VHS Retirement Plan was a *sui juris* entity capable of being sued in its own right. Rather, the bankruptcy court ruled that the VHS Retirement Plan was "tantamount to a pre-petition contract between VHS and the plan participants," citing *Westley v. Cal. Pub. Employees Ret. Sys. Bd. of Admin.*, 105 Cal.App. 4th 1095, 1116 (3d Dist.2003). The bankruptcy court ruled that VHS' only funding obligation arose from this contractual relationship, implicitly rejecting any theory that the underfunding implicated the California Constitution. Finally, the bankruptcy court

ruled that the Trustees had no contractual obligations under the Retirement Plan in their individual capacities. Noting that the Kirton Parties had been on notice throughout VHS' bankruptcy case of relevant deadlines but had failed to take any action to protect any claim they might have had against VHS for underfunding the Retirement Plan, the bankruptcy court concluded that the claims asserted in the Petition were barred by the confirmed Chapter 9 Plan.

Based upon the foregoing, the bankruptcy court ruled that granting the Dismissal Motion was appropriate, as was granting it without leave to amend where the claims stated by the Petition could not possibly be cured by the allegation of other facts. Further, extending the Dismissal Order to cover claims asserted against MetLife, notwithstanding MetLife's failure to make an appearance in response to the Petition, was warranted because MetLife's position was aligned with that of the VHS Defendants.

The order ("Reconsideration Order") denying the Reconsideration Motion was entered February 24, 2011. The Kirton Parties thereafter timely appealed both the Dismissal Order and the Reconsideration Order.

II. JURISDICTION

The bankruptcy court had "related to" jurisdiction under 28 U.S.C. §§ 1334 and 157. *See Valley Health Sys. v. Kirton (In re Valley Health Sys.)*, 584 Fed.Appx. 477 (9th Cir.2014). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

Whether the bankruptcy court clearly erred and/or abused its discretion when it dismissed the adversary proceeding.

IV. STANDARDS OF REVIEW

We review de novo the bankruptcy court's interpretation of the Civil Rules. *Am. Sports Radio Network, Inc. v. Krause (In re Krause)*, 526 F.3d 1070, 1073 n. 5 (9th Cir.2008). Thus, the bankruptcy court's dismissal of an adversary proceeding for failure to state a claim under Civil Rule 12(b)(6) is reviewed de novo. *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir.2011); *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 572 (9th Cir.2011).

“Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir.2004) (citation omitted). Where amendment would be futile, it is not error for a trial court to deny leave to amend. *Id.*, citing *Saul v. United States*, 928 F.2d 829, 843 (9th Cir.1991).

We review the bankruptcy court's denial of a motion for reconsideration for an abuse of discretion. *Tracht Gut, LLC v. Cnty. of L.A. Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 503 B.R. 804, 809 (9th Cir.BAP2014). Review of an abuse of discretion determination involves a two-prong test; first, we determine de novo whether the bankruptcy court identified the correct legal rule for application. *See United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir.2009)(en banc). If not, then the bankruptcy court necessarily abused its discretion. *See id.* at 1262. Otherwise, we next review whether the bankruptcy court's application of the correct legal rule

was clearly erroneous. We will affirm unless its fact findings were illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *See id.*

We may affirm the decision of the bankruptcy court on any basis supported by the record. *See ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir.2014); *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir.2008).

V. DISCUSSION

1. *The Bankruptcy Court Dismissed the Adversary Proceeding Because the Kirton Parties Failed to Comply With National and Local Rules.*

It is well- and long-established that a court's local rules have the force of law. *See Weil v. Neary*, 278 U.S. 160, 169 (1929). This principle includes the bankruptcy court's Local Rules. *See Price v. Lehtinen (In re Lehtinen)*, 332 B.R. 404, 412–14 (9th Cir.BAP2005), *aff'd*, 564 F.3d 1052 (9th Cir.2009).

In the Bankruptcy Court for the Central District of California, Local Rule 9013–1(f) provides, with exceptions not relevant to this appeal, that “each interested party opposing or responding to the motion must file and serve the response (Response) on the moving party and the United States trustee not later than 14 days before the date designated for hearing.” Further, Local Rule 9013–1(h) cautions “if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be.”

The VHS Defendants filed the Dismissal Motion on October 22, 2010. The notice of motion, with which the Kirton Parties were served, warned that a failure to file

a timely opposition to the Dismissal Motion could be treated by the bankruptcy court as consent to the relief requested in the Dismissal Motion. Notwithstanding the notice that serious consequences might result if a timely response to the Dismissal Motion was not filed, the Kinton Parties never filed any response, even with several opportunities to do so.

The original scheduled hearing date on the Dismissal Motion was November 30, 2010, making the Kirton Parties' response due no later than November 16, 2010. The record establishes that on November 24, 2010, the parties filed a stipulation to continue the hearing to a proposed date of December 30, 2010; that the continuance was a professional courtesy being extended to counsel for the Kirton Parties based upon his poor health; and that the parties expressly stipulated "[t]o allow [the Kirton Parties'] Opposition and [the VHS Defendants'] Reply to the Opposition to [the Dismissal Motion] to be filed in accordance with the new date [sic] hearing." The bankruptcy court ultimately reset the hearing on the Dismissal Motion for January 4, 2011, resetting the deadline for the Kirton Parties to file an opposition to the Dismissal Motion to December 21, 2010. A joint status report also was due on December 21, 2010 under the Local Rules; however, counsel for the VHS Defendants was unable to obtain the cooperation of counsel for the Kirton Parties. The VHS Defendants filed a unilateral status report instead. On December 30, 2010, the VHS Defendants filed a notice that no opposition had been filed to the Dismissal Motion. Ultimately, at 9:23 p.m. on January 3, 2011, the day before the Hearing, the Kirton Parties filed their own unilateral status report.

The Kirton Parties belatedly attempted to file an amended complaint, taking the position that the

amended complaint would render the Dismissal Motion moot, thereby relieving the Kirton Parties of the responsibility for responding to the Dismissal Motion, timely or otherwise.

Local Rule 7015–1(a)(3) provides, “Unless otherwise ordered, a pleading will not be deemed amended absent compliance with this rule and [Rule] 7015.” Rule 7015 expressly incorporates Civil Rule 15. Because the Kirton Parties did not amend the Petition within 21 days after the Dismissal Motion was filed, they were required to comply with Civil Rule 15(a)(2), which states: “In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.” The Kirton Parties having obtained neither the written consent of the VHS Defendants nor leave of the bankruptcy court to file their amended complaint, the bankruptcy court properly determined that the Petition was not deemed amended. The Kirton Parties were therefore left with a live Dismissal Motion to which they had not responded. The bankruptcy court neither erred nor abused its discretion in entering the Dismissal Order in these circumstances. That determination was in accordance with Local Rules 9013–1(f) and (h), of which the Kirton Parties were fully informed.

2. Dismissal Without Leave to Amend Was Not Improper

Rule 15(a)(2) requires the bankruptcy court to freely give leave to amend a pleading “when justice so requires.” If, however, upon de novo review, it is clear that the Petition could not be saved by any amendment, dismissal without leave to amend is not improper. *See*

Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir .1991). To dismiss a pleading without leave to amend, the bankruptcy court was required to determine that the Petition could not possibly be cured by the allegation of other facts. *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir.2001).

Any underfunding of the Retirement Plan could only be collected from VHS. As noted by the bankruptcy court, the Petition through its various claims for relief sought damages in excess of \$100 million for the alleged underfunding of the Retirement Plan since 1999. Yet, in light of the terms of the confirmed Chapter 9 Plan, no action could be taken to require VHS to pay additional funds into the Retirement Plan. In these circumstances, the bankruptcy court concluded that the Petition failed to state a plausible claim for relief against any of the VHS Defendants or MetLife, a fatal defect that could not be cured by amendment. We agree with the bankruptcy court's conclusion. It is clear that the allegation of additional facts would not cure the defects in the Petition. Accordingly, the bankruptcy court did not err in dismissing the Petition without leave to amend.

3. The Scope of the Dismissal Was Not Improper

The Kirton Parties contend that the bankruptcy court erred in dismissing the Petition as to all of the named respondents when not all had requested dismissal. Aside from Does 1–200, the only “Respondent” named in the Petition that did not join in the Dismissal Motion was MetLife.

*7 The Ninth Circuit has held as a matter of law that dismissal with prejudice in favor of a party which has

not appeared can be based upon the presentations of other defendants which have appeared. *See Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 743 (9th Cir.2008). MetLife was the administrator of the Retirement Plan; its interest was absolutely aligned with that of the VHS Defendants. The bankruptcy court determined that MetLife was in an identical position to the VHS Defendants such that the claims in the Petition against MetLife also should be dismissed without leave to amend. Not only was it within the authority of the bankruptcy court to do so (*see Silverton v. Dep't. of Treasury*, 644 F.2d 1341, 1345 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981)), it was not error in the circumstances before us.

VI. CONCLUSION

In light of the failure of the Kirton Parties to comply with the Local Rules in relation to the Dismissal Motion, the bankruptcy court did not err when it dismissed the Petition. Nor was dismissal without leave to amend the Petition error where the confirmed Chapter 9 Plan precluded any effort by the Kirton Parties to compel VHS to provide additional funding to the Retirement Plan. Extending the scope of the Dismissal Order to MetLife was appropriate where MetLife was merely the administrator of the Retirement Plan and was aligned with all of the other VHS Defendants. Accordingly, we AFFIRM both the Dismissal Order and the Reconsideration Order.⁵

Footnotes

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see* Fed. R.App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8024–1.

2

The Prior Disposition was a reported opinion: *Kirton v. Valley Health Sys. (In re Valley Health Sys.)*, 471 B.R. 555 (9th Cir.BAP2012).

3

Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all “Rule” references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037. All “Civil Rule” references are to the Federal Rules of Civil Procedure.

4

A complete recitation of the facts is set forth in the Prior Disposition. The facts in this Memorandum are more summary in nature, and borrow heavily from the previously stated facts.

5

Appellants filed two requests for judicial notice in this appeal. The first requested that we take judicial notice of (1) the list of creditors in the chapter 9 case and (2) the docket of the chapter 9 case. The second, filed days before oral argument, requested that we take judicial notice of a June 2, 2003, opinion of the Attorney General for the State of California. We deny the requests on the basis that the documents which Appellants request that we take judicial notice of are not relevant to the disposition of this appeal or are merely redundant to facts and/or authorities already in the record before us.

In re:	)	Case No. 6:07-bk-18293-
	)	PC
VALLEY HEALTH	)	
SYSTEM, a California	)	Chapter 9
Local Health Care	)	
District,	)	Adversary No. 6:10-ap-
	)	01566-PC
Debtor.	)	
PEGGY KIRTON and	)	ORDER DENYING
DIANA AGNELLO,	)	MOTION BY
	)	PETITIONERS FOR
Plaintiffs,	)	RECONSIDERATIO
	)	N AND VACATION
v.	)	OF “ORDER
	)	GRANTING
VALLEY HEALTH	)	RESPONDENTS
SYSTEM, a California	)	VALLEY HEALTH
Local Health Care	)	SYSTEM’S, VALLEY
District, <u>et al.</u> ,	)	HEALTH
	)	RETIREMENT
Defendants.	)	PLAN’S, JOEL
	)	BERGENFELDS’S
	)	VINAY M. RAO’S
	)	AND MICHELE
	)	BIRD’S MOTION TO
	)	DISMISS PETITION
	)	FOR WRIT OF
	)	MANDATE
	)	PURSUANT TO
	)	CODE OF CIVIL

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) **PROCEDURE 1085**
) **RE (1) VIOLATION**
) **OF VALLEY**
) **HEALTH SYSTEM'S**
) **RETIREMENT**
) **PLAN; (2)**
) **VIOLATION OF**
) **CALIFORNIA**
) **CONSTITUTION; (3)**
) **BREACH OF**
) **CONTRACT; AND (4)**
) **DECLARATORY**
) **RELIEF**
)
) Date: March 1, 2011
) Time: 9:30 a.m.
) Place: United States
) Bankruptcy Court
) Courtroom #1539
255 East Temple Street
Los Angeles, CA 90012

Based upon the findings of fact and conclusions of law set forth in the court's memorandum decision of even date herewith, it is hereby

ORDERED that the Motion By Petitioners for Reconsideration and Vacation of "Order Granting Respondents Valley Health System's, Valley Health Retirement Plan's, Joel Bergenfeld's, Vinay M. Rao's and Michele Bird's Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System's Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief in the above referenced adversary proceeding is denied.

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DATED: February 24, 2011

PETER H. CARROLL
United States Bankruptcy

Judge

In re:	)	Case No. 6:07-bk-18293-PC
	)	
VALLEY HEALTH	)	
SYSTEM, a California	)	Chapter 9
Local Health Care	)	
District,	)	Adversary No. 6:10-ap-
	)	01566-PC
Debtor.	)	
	)	
	)	MEMORANDUM
PEGGY KIRTON and	)	DECISION RE:
DIANA AGNELLO,	)	MOTION BY
	)	PETITIONERS FOR
Plaintiffs,	)	RECONSIDERATIO
	)	N AND VACATION
v.	)	OF “ORDER
	)	GRANTING
VALLEY HEALTH	)	RESPONDENTS
SYSTEM, a California	)	VALLEY HEALTH
Local Health Care	)	SYSTEM’S, VALLEY
District, <u>et al.</u> ,	)	HEALTH
	)	RETIREMENT
Defendants.	)	PLAN’S, JOEL
	)	BERGENFELDS’S
	)	VINAY M. RAO’S
	)	AND MICHELE
	)	BIRD’S MOTION TO
	)	DISMISS PETITION
	)	FOR WRIT OF
	)	MANDATE
	)	PURSUANT TO

24a

) **CODE OF CIVIL**
) **PROCEDURE 1085**
) **RE (1) VIOLATION**
) **OF VALLEY**
) **HEALTH SYSTEM'S**
) **RETIREMENT**
) **PLAN; (2)**
) **VIOLATION OF**
) **CALIFORNIA**
) **CONSTITUTION; (3)**
) **BREACH OF**
) **CONTRACT; AND (4)**
) **DECLARATORY**
) **RELIEF**
)
) Date: March 1, 2011
) Time: 9:30 a.m.
) Place: United States
) Bankruptcy Court
Courtroom #1539
255 East Temple Street
Los Angeles, CA 90012

Before the court is the motion of Plaintiffs, Peggy Kirton and Diana Agnello (collectively, "Kirton") for reconsideration and vacation of this court's Order Granting Respondents, Valley Health System's, Valley Health Retirement Plan's, Joel Bergenfeld's, Vinay M. Rao's and Michele Bird's Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System's Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief ("Order") entered on January 18, 2011. Having considered the grounds for

reconsideration stated in Kirton's motion in light of the court's findings of fact and conclusions of law stated orally and recorded in open court at the hearing on January 4, 2011, which form the basis for the Order, the court dispenses with oral argument and denies the relief requested in the motion based upon the following findings of fact and conclusions of law¹ made pursuant to F.R.Civ. P. 52(a)(1),² as incorporated into FRBP 7052, and applied to contested matters by FRBP 9014(c).

I. STATEMENT OF FACTS

On August 26, 2010, Kirton filed a Petition for Writ of Mandate Pursuant to Code of Civil Procedure § 1085 Re: (1) Violation of Valley Health Systems Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief against Valley Health System, a California Local Health Care District ("VHS"), the Valley Health System Retirement Plan Adopted January 1, 1971, as amended (the "VHS Retirement Plan"), Joel Bergenfeld, Vinay M. Rao, and Michele Bird, individually and in their capacities as Trustees of

¹ To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.

² Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11U.S.C. §§101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P.").

the VHS Retirement Plan (collectively, “the VHS Defendants”), in Case No. RIC 10017129, Kirton, et al. v. Valiev Health Systems, et al., in the Superior Court of California, County of Riverside. By Notice of Removal of Civil Action filed on September 22, 2010, VHS removed the pending state court action to this court pursuant to 28 U.S.C. § 1452(a) and FRBP 9027.

On October 22, 2010, the VHS Defendants filed a motion seeking a dismissal of the petition³ pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure⁴ alleging, in pertinent part, that Kirton’s petition fails to state a claim upon which relief can be granted because:

1. Kirton’s claims against VHS for alleged violation of the VHS Retirement Plan were discharged under VHS’s confirmed chapter 9 plan;
2. The trustees of the VHS Retirement Plan, unlike VHS, do not have any contractual obligations to Kirton under the VHS Retirement Plan;
3. Neither the VHS Retirement Plan nor the trustees of the plan constitute a “retirement board” within the meaning of the California Pension Protection Act of 1992, Cal. Const, art. XVI, § 17;
4. The VHS Retirement Plan is not a separate legal entity that can sue or be sued;
5. Kirton failed to comply with the California Government Claims Act, which requires a party bringing an action against a public entity, where the primary purpose of the action is the recovery of

³ Kirton’s petition, as stated in the VHS Defendants’ motion to dismiss, erroneously names VHS as “Valley Health Systems” and the VHS Retirement Plan as the “Valley Health Systems Retirement Plan.”

⁴ Rule 12(b)(6) is applicable to adversary proceedings by virtue of FRBP 7012(b).

money damages, to exhaust their administrative remedies before bringing such action;

6. VHS, as a public entity, and its employees, as public employees, are immune from liability under the California Government Code. Cal. Gov't Code §§ 905, et seq.;
7. Kirton's petition is procedurally defective in that it (a) fails to show other remedies were inadequate; (b) cannot compel VHS to perform an act which would involve the exercise of discretion; (c) the trustees have no duty to act as alleged by Kirton; and (d) the petition lacks verification;
8. Kirton fails to plead the essential terms of an alleged contract in conjunction with the "Third Cause of Action for Breach of Implied and Express Contract" or to attach the alleged contract to the petition;
9. Kirton fails to allege any current controversy or on-going violations in conjunction with the "Fourth Cause of Action for Declaratory Relief;" and
10. Kirton seeks to recover on account of a pre-petition claim in violation of the automatic stay and discharge injunction provisions of VHS's chapter 9 plan and confirmation order.⁵

The VHS Defendants⁵ Motion to Dismiss was originally set for hearing on November 30, 2010, but was continued at Kirton's request to December 30, 2010.

⁵ Respondents Valley Health System's, Valley Health Retirement Plan's, Joel Bergenfeld's, Vinay M. Rao's and Michele Bird's Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System's Retirement Plan;(2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief ("Motion to Dismiss"), 4:20 - 6:22.

The court then continued the hearing on the motion sua sponte to January 4, 2011.⁶

Kirton did not file a written response in opposition to the VHS Defendants' Motion to Dismiss, although the deadline to file opposition was extended by agreement of the parties in conjunction with the continuance of the hearing on the motion. Instead, Kirton filed an amended complaint at 10:22 p.m. on January 3, 2011 – the evening before the hearing. After a hearing on January 4, 2011, the court granted the VHS Defendants' motion based upon findings of fact and conclusions of law made on the record at the hearing. The Order was entered on January 18, 2011, dismissing Kirton's petition without leave to amend. Kirton now seeks reconsideration of the Order.

II. DISCUSSION

This court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (I), (L) and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

⁶ By order dated September 28, 2010, the court directed the parties to attend a status conference in the removed action on December 7, 2010. By Stipulation to Continue Hearing Date of Respondents' 12(b)(6) Motion to Dismiss and Status Conference Date filed on November 24, 2010, Kirton and the VHS Defendants sought to continue the court's status conference to December 30, 2010, and to continue a hearing on the VHS Defendants' Motion to Dismiss to the same date and time. Because December 30, 2010 was not a permissible date for hearings on motions arising in adversary proceedings, the court continued the status conference and hearing on the VHS Defendants' Motion to Dismiss sua sponte to January 4, 2011.

A. Standard for Reconsideration Under Rule 9023

Rule 9023 makes Rule 59(e) of the Federal Rules of Civil Procedure applicable in bankruptcy cases. FRBP 9023. Rule 59(e) authorizes the filing of a motion to alter or amend a judgment not later than 14 days after entry of the judgment. F.R.Civ.P.59(e). Reconsideration is “an ‘extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.’” Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). In the Ninth Circuit, “a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.” Kona Enters., 229 F.3d at 890 (quoting 389 Orange Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)). Reconsideration may also be granted “as necessary to prevent manifest injustice.” Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

In this case, the Order was entered on January 18, 2011. Kirton’s motion was filed on January 28, 2011 – within 14 days of entry of the Order. Kirton’s motion is timely under Rule 9023. Kirton’s motion does not allege newly discovered evidence nor an intervening change in controlling law. Nor does Kirton’s motion allege that reconsideration is necessary to prevent manifest injustice. Kirton alleges (1) irregularities in the post-hearing proceedings; (2) abuse of discretion; (3) insufficiency of evidence to support issuance of the Dismissal Order; and (4) errors of law. Specifically, Kirton asserts:

1. The **irregularities** include the following:
(a) the inclusion of parties to whom Petitioners were entitled to entry of default within the coverage of the Dismissal Order; (b) the granting of relief in the Dismissal Order beyond what was requested in the 12(b)(6) Motion; and (c) by the device of including names of purported parties not named in the Petition, Respondent improperly expanded the scope of their representation, which, as a result of entry of the Dismissal Order containing such names, has potentially resulted in the inclusion of parties who were not even named in the Petition, to wit: “VALLEY HEALTH SYSTEMS RETIREMENT PLAN, a public employee retirement entity”, and possibly other defined benefit plans maintained for the benefit of VHS employees.
2. The **insufficiency of evidence** includes the following: (a) the inclusion within the scope of the Dismissal Order of Respondent MetLife, and “VALLEY HEALTH SYSTEMS RETIREMENT PLAN, a public employee retirement entity”, even though such Respondents had failed to make an appearance in the Adversary Proceeding; (b) the inclusion in the Dismissal Order of a provision dismissing the “entire action”, although no evidence was presented in the 12(b)(6) Motion, or otherwise, that such relief was

warranted or even requested.

3. The errors of law include the following: (a) violation of the “Single Judgment Rule” (FRCP 54); (b) lack of subject matter jurisdiction, including (c) lack of “core matter” jurisdiction as to “VALLEY HEALTH SYSTEMS RETIREMENT PLAN, a public employee retirement entity”.⁷

B. The Court Properly Dismissed All Claims Made the Basis of Kirton’s Petition Under Rule 12(b)(6).

With respect to the first and second grounds for reconsideration, the court properly dismissed all claims made the basis of Kirton’s petition notwithstanding the fact that Kirton erroneously named VHS and the VHS Retirement Plan in the petition and MetLife, Inc.

⁷ Motion By Petitioners for Reconsideration and Vacation of “Order Granting Respondents Valley Health System’s, Valley Health Retirement Plan’s, Joel Bergenfeld’s, Vinay M. Rao’s and Michele Bird’s Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System’s Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief (“Reconsideration Motion”), 6:14 - 7:7. The court notes that Kirton previously objected to the form of the Order on nearly identical grounds. See Petitioners’ Objection to Form of Order Entitled: “[Proposed] Order Granting Respondents Valley Health System’s, Valley Health Retirement Plan’s, Joel Bergenfeld’s, Vinay M. Rao’s and Michele Bird’s Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System’s Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief” filed on January 14, 2011, 3:12 - 5:9. The court overruled Kirton’s objections and entered the Order on January 18, 2011.

(“MetLife”), the administrator of the VHS Retirement Plan, had yet to file a responsive pleading in the adversary proceeding.

Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint for failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).⁸ Under Rule 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” F.R. Civ. P. 8(a)(2).⁹ “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 570). “[A] complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability... ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Iqbal, 129 S.Ct. 1949 (quoting Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept plaintiff’s legal conclusions as true. Iqbal, 129 S.Ct. at 1949. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (quoting Twombly, 550 U.S. at 555).

⁸ Rule 12(b)(6) is applicable to adversary proceedings by virtue of FRBP 7012(b).

⁹ Rule 8(a) is applicable to adversary proceedings by virtue of FRBP 7008(a).

Twombly raised the bar for notice pleadings under Rule 8(a) such that a complaint will not survive a motion to dismiss under Rule 12(b) unless “the non-conclusory ‘factual content,’ and reasonable inferences from that content... plausibly [suggest] a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). 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. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557; see Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 802-03 (7th Cir. 2008) (stating that Twombly “teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case”).

Because the focus is the substance of the complaint, the court does not weigh or determine the “sufficiency of evidence” in conjunction with a Rule 12(b)(6) motion.¹⁰ However, a matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss for failure to state a claim. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (“On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.”); accord Banco Santander De Puerto Rico v. Lopez-Stubbe (In

¹⁰ For this reason alone, Kirton’s assertion that the Order should be vacated for “insufficiency of evidence” is without merit.

re Colonial Mortg. Bankers Corp.), 324 F.3d 12, 16, 19 (1st Cir. 2003) (“[M]atters of public record are fair game in adjudicating Rule 12(b)(6) motions, and a court’s reference to such matters does not convert a motion to dismiss into a motion for summary judgment.”); Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994) (“Despite the express language of Fed.R.Civ.P. 12(b), we recently held that ‘[t]he district court may also take judicial notice of matters of public record’ without converting a 12(b)(6) motion into a motion for summary judgment.” (citation omitted)).

Kirton’s petition failed to state a plausible claim for relief against any of the VHS Defendants or MetLife. VHS had only one retirement plan – the VHS Retirement Plan identified in VHS’s disclosure statement.¹¹ Kirton’s petition seeks damages in excess of \$100 million under various theories for alleged underfunding of the VHS Retirement Plan since 1999. VHS filed a voluntary petition under chapter 9 in the above referenced bankruptcy case on December 13, 2007. Benefits accruing under the VHS Retirement Plan had been frozen since May 4, 1999.¹² On the petition date, the VHS Retirement Plan was tantamount to a pre-petition contract between VHS and the plan participants. See Westley v. Cal. Pub. Employees Ret. Sys. Bd. Of Admin., 105 Cal. App. 4th 1095, 1116 (3d Dist. 2003) (observing that retirement benefits under the CalPERS fund were contractual obligations of the state). VHS’s only funding obligations arose from its contractual obligations under the VHS Retirement

¹¹ First Amended Disclosure Statement With Respect to the Plan for the Adjustment of Debts of Valley Health System Dated December 17, 2009 (“VHS Disclosure Statement”), 31:27-28.

¹² Id., 31:27-32:2.

Plan. The trustees of the VHS Retirement Plan had no contractual obligations under the plan in their individual capacities. Kirton received notice of VHS's bankruptcy and the deadline of August 25, 2008, within which to file proofs of claim.¹³

On April 26, 2010, an order was entered confirming VHS's chapter 9 plan of adjustment.¹⁴ VHS's confirmed plan treated allowed claims of VHS Retirement Plan participants in Class # 2.¹⁵ Kirton did not object to confirmation of VHS's plan, which contemplated a sale of substantially all of VHS's assets

¹³ Request for Judicial Notice in Support of Respondents Respondents Valley Health System's, Valley Health Retirement Plan's, Joel Bergenfeld's, Vinay M. Rao's and Michele Bird's Motion to Dismiss Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health System's Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief ("VHS Defendants' Request for Judicial Notice"), # 1 & 2, Exhibits A & B: 15 & 45.

¹⁴ *Id.*, # 3, Exhibit C.

¹⁵ First Amended Plan for the Adjustment of Debts of Valley Health System Dated December 17, 2009, as Modified ("VHS Plan"), 16:7-22. "Because chapter 9 only incorporates administrative claims allowed under section 507(a)(2), this Defined Benefit Plan Claim is not entitled to priority status and should be instead treated as an unsecured Class 2C Claim under the Plan." VHS Disclosure Statement, 21:15-17. "Defined Benefit Plan Participants will be entitled to the same rights and benefits to which such participants are currently entitled under the VHS Retirement Plan and the MetLife Group Annuity Contract, and such participants shall have no recourse to the District or to any assets of the District, and shall not be entitled to receive any distributions under this Plan. Instead, all unallocated amounts held by MetLife Group, pursuant to the VHS Retirement Plan and MetLife Group Annuity Contract, will continue to be made available to provide retirement benefits for participants in the manner indicated under the provisions of the VHS Retirement Plan and MetLife Group Annuity Contract." VHS Plan, 16:13-20.

to Physicians for Healthy Hospitals, Inc. When the sale closed on October 13, 2010, VHS's confirmed plan of adjustment became effective and binding upon all parties in interest, including Kirton.¹⁶ VHS was then discharged from its pre-petition obligations to Kirton based upon or arising out of the VHS Retirement Plan except as provided by the confirmed plan and Kirton was enjoined from enforcing such obligations except as provided by the confirmed plan.¹⁷

Finally, the fact that MetLife, the VHS Retirement Plan administrator, had not joined the VHS Defendants' Motion to Dismiss or otherwise filed a responsive pleading in the adversary proceeding did not prevent the court from dismissing Kirton's claims against MetLife without leave to amend as well, See, e.g., Abagninin v. AMY AC Chemical Corp., 545 F.3d 733, 743 (9th Cir. 2008) ("As a legal matter, we have upheld dismissal with prejudice in favor of a party which had not appeared, on the basis of facts presented by other defendants which had appeared."); Silverton v. Department of Treasury, 644 F.2d 1341,1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of the moving defendants or where claims against such defendants are integrally related."), cert. denied, 454 U.S. 895 (1981). In this case,

¹⁶ VHS Defendants' Request for Judicial Notice, # 4, Exhibit D:1,3.

¹⁷ Id. "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect. Res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits in a previous action involving the same parties and claims." Trulis v. Barton, 107 F.3d 685, 691 (9th Cir. 1995) (citations omitted).

MetLife was in an identical position to the VHS Defendants and Kirton's claims against MetLife, as set forth in the petition, were integrally related to those asserted against the VHS Defendants. It was, therefore, appropriate to dismiss the causes of action asserted in Kirton's complaint against all defendants, including MetLife, without leave to amend.

C. The Court Had Subject Matter Jurisdiction Over Kirton's Petition and Authority to Dismiss the Petition Under Rule 12(b)(6).

By reference from the district court, a bankruptcy court has subject matter jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). VHS invoked the subject matter jurisdiction of this court upon the filing of its voluntary chapter 9 petition on December 13, 2007. The court confirmed VHS's plan of adjustment on April 26, 2010. This court has subject matter jurisdiction of any disputes "affecting 'the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" State of Montana v. Goldin (in re Pegasus Gold Corp.), 394F.3d 1189, 1194 (9th Cir. 2005) (quoting In re Resorts Int'l. Inc., 372 F.3d 154, 167 (3d Cir. 2004).

In its notice of removal filed on September 22, 2010, VHS stated in pertinent part:

9. Each cause of action and the damages sought by Petitioners may directly or indirectly impact the property of the District's bankruptcy estate as defined in section 541(a) of the Bankruptcy Code, over which this court has exclusive

jurisdiction. This matter therefore falls squarely within federal bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334, because it arises in, arises under or relates to a proceeding under title 11.

10. Additionally, because the litigation implicates substantive rights created by the Bankruptcy Code, and implicates matters concerning the administration of the estate, as well as the allowance or disallowance of claims against the estate or exemptions from property of the District's estate, and the implementation of the District's confirmed Plan, the Litigation is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and/or (L).

Notice of Removal of Civil Action Under 28 U.S.C. § 1452(a), 3:22 – 4:7 (citations omitted).

If Kirton had grounds to believe that removal was improper, Kirton was required by LBR 9027-1(c) to file a motion seeking a remand of the removed action not later than October 22, 2010-30 days after the date of filing of the notice of removal. Kirton did not timely seek a remand. If Kirton disagreed with the VHS Defendants' designation of the claims made the basis of Kirton's petition as "core" proceedings in the notice of removal, Kirton should have filed, not later than 14 days after the filing of the notice of removal, a statement "admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core." FRBP 9027(e)(3), Kirton did not do so. Nor did Kirton file a written response in opposition to the VHS Defendants' Motion to Dismiss.

Kirton's claim that a "misunderstanding" was the genesis of Kirton's failure to file a written response in opposition to the VHS Defendants' Motion to Dismiss is belied by the record, including the proceedings on January 4, 2011, during which the court made the following findings:

All right. I have reviewed the motion, the supporting declaration and request for judicial notice. There's no opposition to the request for judicial notice. It is granted. The Court has not received any opposition to the motion. I have to agree with Mr. Klausner.

The Defendants' Rule 12(b) motion was filed and served on October 22nd, 2010. The matter was set on regular notice. This was no surprise to the Plaintiff[s]. It was set for hearing on November 30th, 2010. The Plaintiffs were required to file and serve written opposition not later than November 16th, 2010. No opposition was filed. By stipulation filed on November 24th, 2010, the Plaintiffs and Defendants stipulated to a continuance of the hearing to December 30th, 2010 together with an extension of time for the Plaintiffs to file their response in opposition because the Plaintiffs' counsel, as stated in the stipulation, was suffering from some medical issues.

The Court continued the hearing to January 4th, 2011. According to paragraph two of the stipulation and according to our local Bankruptcy Rule 9013-1(f), a response in opposition was to be filed and served not later than 14 days prior to today's hearing, which would have been December 21 st, 2010. Plaintiffs

did not file and serve a response in opposition to the motion. And, as Mr. Klausner pointed out, our local Bankruptcy Rule 9013-1(h) specifically states that the failure to file opposition can be deemed by the Court as consent to the granting of the relief requested in the motion.

What the Plaintiffs did, instead, was to file an amended complaint late yesterday afternoon. Our local Bankruptcy Rule 7015-1 (a)(3) states that a pleading will not be deemed amended absent compliance with local Bankruptcy Rule 7015-1 and Bankruptcy Rule 7015. Rule 15(a)(1), which is incorporated into Bankruptcy Rule 7015 states in pertinent part that a party may amend its pleading once as a matter of course 21 days after service of a motion under Rule 12(b).

Rule 15(a)(2) goes on to state that in all other cases a party may amend its pleading only with the opposing party's written consent or with leave of court. The Plaintiffs' amended complaint was filed after the original 21 day period expired as set forth in Rule 15(a)(1) and after the extension of that time by the stipulation between the parties to December 14th, 2010. The Plaintiffs did not obtain the Defendants' written consent to amend its complaint. Plaintiffs did not obtain leave of court. The Plaintiffs did not seek a continuance or seek further time to respond to the motion if further time was necessary and, in conjunction with that response that the court would have ultimately expected to the motion, set forth the reasons why leave to amend should be granted in light of the merits of the motion to dismiss.

The notice of - Respondents' notice of non-

opposition, which was referenced by Mr. Klausner states on page three beginning at line 2 Mr. Peterson and Mr. Silverstein indicated that Petitioners intended to file an amended petition in response to the motion to dismiss without seeking leave of this Court. Respondents have yet to be served with an amended petition. Moreover, any amended petition would be untimely and should not be considered by this Court. Petitioners had only 21 days after Respondents' motion to dismiss was filed to file an amended pleading as a matter of right, citing Rule 15(a)(1)(B). The motion to dismiss was filed on October 22nd. Accordingly, any amended pleading filed as a matter of right should have been filed on or before November 12, 2010, and can no longer be timely filed.

The Court would be willing to extend that in conjunction with the stipulation to December 21st, but that was not even done. Accordingly - and the Court would finally note the Court is not required to consider an amended pleading that was not filed in accordance with Rule [15(a)] in conjunction with a determination of the merits of a motion to dismiss under Rule 12(b). Booth v. United States, 2007 WL 2462158 (E.D. Cal.); Jones v. Marinello, 2006 WL 2348891 (N.D. Cal.). So for the reasons stated in the motion and based upon the declaration, Joel Bergenfeld in support of the motion and the request for judicial notice in support of the motion, the motion is granted. The complaint is dismissed without leave to amend.

Finally, the court is not prevented by Rule 54(c)¹⁸ from dismissing Kirton's petition under Rule 12(b)(6) against all defendants in this adversary proceeding, as alleged by Kirton. Rule 54(c), which simply provides that "a default judgment must not differ in kind from, or exceed the amount, what is demanded in the pleadings," has no application to a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Reconsideration under Rule 9023 is not intended to give a litigant a "second bite at the apple." See In re Christie, 222 B.R. 64, 67 (Bankr. D.N.J. 1998) (citation omitted); see also Voelkel v. Gen. Motors Corp., 846 F.Supp. 1482, 1483 (D. Kan. 1994), aff'd, 43 F.3d 1484 (10th Cir. 1994) ("A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed."); U.S. v. Carolina E. Chem. Co., 639 F. Supp. 1420, 1423 (D.S.C. 1986) ("A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact or a conclusion of law."); In re Hill is Motors, Inc., 120 B.R. 556, 557 (Bankr. D. Haw. 1990) (Rule 59 does not "give a disappointed litigant another chance." (citation omitted)).

D. The Court Properly Dismissed Kirton's Petition Without Leave to Amend.

Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "[t]he court should freely give leave [to amend] when justice so requires." F.R.Civ.P.

¹⁸ Rule 54(c) is applicable to adversary proceedings by virtue of FRBP 7054.

15(a)(2).¹⁹ “Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir. 1991). “[L]eave to amend should be granted unless the district court ‘determines that the pleading could not possibly be cured by the allegation of other facts.’” U.S. v. SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001) (citation omitted); Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)). In this case, the court properly dismissed the Kirton’s petition without leave to amend because the petition could not possibly be cured by the allegation of other facts given the nature of the deficiencies.

III. CONCLUSION

For the reasons stated, Kirton’s motion will be denied.

A separate order will be entered consistent with this memorandum.

DATED: February 24, 2011

PETER H. CARROLL
United States Bankruptcy Judge

¹⁹ Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: VALLEY HEALTH
SYSTEM, a California Local
Health Care District,

Debtor,

PEGGY KIRTON and DIANA
AGNELLO,

Appellants,

v.

VALLEY HEALTH SYSTEM;
et al.,

Appellees.

No. 15-60023

BAP No. 11-1100

ORDER

Before: WARDLAW and BYBEE, Circuit Judges, and
BARTLE,* District Judge.

The panel has voted unanimously to deny the
petition for rehearing. Judges Wardlaw and Bybee
voted to deny the petition for rehearing en banc, and
Judge Bartle so recommended.

The full court was advised of the suggestion for
rehearing en banc and no judge has requested a vote on

* The Honorable Harvey Bartle III, United States District Judge
for the Eastern District of Pennsylvania, sitting by designation.

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whether to rehear the matter en banc. Fed. R. App. P.
35.

The petition for rehearing and the suggestion for
rehearing en banc are **DENIED**. No further petitions
for panel or en banc rehearing will be entertained.

IT IS SO ORDERED.

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Vinay M. Rao, individually and in his capacity as a
Trustee of the Valley Health System Retirement Plan;

and Michelle Bird, individually and in her capacity as a
Trustee of the Valley Health System Retirement Plan

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION**

In re	)	Bankr. Case No. 6:07-
	)	bk-18293-PC
VALLEY HEALTH	)	
SYSTEM, a California	)	Adv. Pro. No. 6:10-ap-
Local Health Care	)	1566-PC
District,	)	
	)	Chapter 9
Debtor.		
PEGGY KIRTON, an	)	ORDER GRANTING
individual; and DIANA	)	RESPONDENTS
AGNELLO, an	)	VALLEY HEALTH
individual,	)	SYSTEM'S,
	)	VALLEY HEALTH
	)	RETIREMENT
Petitioners,	)	PLAN'S, JOEL
	)	BERGENFELD'S,
v.	)	VINAY M. RAO'S
	)	AND MICHELE
VALLEY HEALTH	)	BIRD'S MOTION TO
SYSTEM, a California	)	DISMISS PETITION
Local Health Care	)	FOR WRIT OF
District; the VALLEY	)	MANDATE
HEALTH SYSTEM	)	PURSUANT TO
RETIREMENT PLAN,	)	CODE OF CIVIL
a public employee	)	PROCEDURE 1085
retirement entity, JOEL	)	RE: (1) VIOLATION
BERGENFELD,	)	OF VALLEY
individually and in his	)	HEALTH

capacity as a Trustee of	)	SYSTEM'S
the Valley Health System	)	RETIREMENT
Retirement Plan, VINAY	)	PLAN; (2)
M. RAO, individually and	)	VIOLATION OF
in his capacity as a	)	CALIFORNIA
Trustee of the Valley	)	CONSTITUTION; (3)
Health System	)	BREACH OF
Retirement Plan,	)	CONTRACT; AND
MICHELE BIRD,	)	(4) DECLARATORY
individually and in her	)	RELIEF
capacity as a Trustee of	)	
the Valley Health System	)	<u>Hearing</u>
Retirement Plan, MET	)	Date: January 4, 2011
LIFE, INC., in its	)	Time: 9:30 a.m.
fiduciary capacity as the	)	Judge: Hon. Peter H.
administrator of the		Carroll
Valley Health System		Place: Courtroom 1539
Retirement Plan, and		255 East Temple
DOES 1 through 200,		Street
inclusive,		Los Angeles,
		California.

Respondents.

The “Respondents Valley Health System’s, Valley Health Retirement Plan’s, Joel Bergenfeld’s, Vinay M. Rao’s And Michele Bird’s Motion To Dismiss Petition For Writ Of Mandate Pursuant To Code Of Civil Procedure 1085 Re: (1) Violation Of Valley Health System’s Retirement Plan; (2) Violation Of California Constitution; (3) Breach Of Contract; And (4) Declaratory Relief” [Docket No. 4] (the “Motion”),²⁰

²⁰ Any capitalized words not defined herein shall have the meaning set forth in the Motion.

filed by Joel Bergenfeld, Vinay M. Rao, and Michele Bird, individually, and in their capacity as trustees of the Valley Health System Retirement Plan (collectively referred to herein as the “Trustees”), Valley Health System, a California Local Health Care District (the “District”), Valley Health System Retirement Plan (the Trustees, the District and the Valley Health System Retirement Plan, are collectively referred to herein as “Respondents”), came on for hearing before the Honorable Peter H. Carroll in Courtroom 1539, located at 255 East Temple Street, Los Angeles, California on January 4, 2011 at 9:30 a.m. Appearances are stated in the record.

Having read and considered, among other things:

- (i) The Motion;
- (ii) The Declaration of Joel Bergenfeld filed in support of the Motion [Docket No. 5];
- (iii) The Request for Judicial Notice filed in support of the Motion [Docket No. 6] (“Request for Judicial Notice”);
- (iv) The Stipulation between Petitioners and Respondents to continue the hearing date on the Motion [Docket No. 12];
- (v) Respondents’ Notice of No Opposition Having Been Filed By Petitioners to the Motion [Docket No. 15]; and
- (vi) Notice of Petitioners’ Intent to File Superseding and/or Amended Pleading [Docket No. 16].

And the Court having considered arguments made by counsel at the hearing, in addition to the findings and conclusions the Court made on the record at the time of

the hearing, the Court makes reference to the following findings:

A. Petitioners Peggy Kirton and Diana Agnello (“Petitioners”) failed to file any opposition or response of any kind to Respondents’ Motion. The Motion was originally scheduled to be heard by the Court on November 30, 2010. Accordingly, under Local Bankruptcy Rule (“LBR”) 9013-1(f), any opposition was due on November 16, 2010. Petitioners did not file an opposition to the Motion at that time. On November 24, 2010, Petitioners and Respondents stipulated to continue the hearing date on the Motion for thirty (30) days. The Court continued the hearing date on the Motion to January 4, 2011. Accordingly, based upon the new hearing date, any opposition to Respondents’ Motion was due December 21, 2010. LBR 9013-1(f).

B. Petitioners’ failure to file an opposition to the Motion may be deemed to be consent by Petitioners to the granting of the Motion, pursuant to LBR 9013-1(h).

C. Petitioners’ attempt to amend the “Petition for Writ of Mandate Pursuant to Code of Civil Procedure 1085 Re: (1) Violation of Valley Health Systems Retirement Plan; (2) Violation of California Constitution; (3) Breach of Contract; and (4) Declaratory Relief” (the “Petition”) on January 3, 2011 was improper and untimely under Federal Rule of Civil Procedure (“FRCP”) 15(a)(1)(B).

D. Petitioners did not seek or acquire written consent from Respondents to amend the Petition or seek leave of the Court to amend the Petition, as required by FRCP 15(a)(2). Accordingly, the Petition is not deemed amended and the Court was not obligated to consider the amended Petition that

Petitioners attempted to file on January 3, 2011. LBR 7015-1(a)(3).

E. Petitioners did not file a motion to continue the hearing on the Motion or to extend the time to respond to the Motion.

Accordingly, the Court hereby **ORDERS** that:

1. Pursuant to FRCP 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b), Respondents' Motion is hereby GRANTED in its entirety, for the reasons set forth in the Motion and herein.

2. Respondents' Request for Judicial Notice, filed concurrently with the Motion, is granted in its entirety.

3 The Petition is hereby dismissed, without leave to amend, as to all of the Respondents and Met Life, Inc., and the entire action is hereby dismissed.

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Presented by:

/s/ Marina Fineman

CHARLES D. AXELROD

GARY E. KLAUSNER

MARINA FINEMAN

NEETA MENON

STUTMAN, TREISTER & GLATT

PROFESSIONAL CORPORATION

Counsel for Valley Health System

DATED: January 18, 2001

United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: VALLEY HEALTH SYSTEM, Debtor.	Case No. LA07-18293-PC Los Angeles, California Tuesday, January 4, 2011 9:30 a.m.
	ADV. 10-01566 KIRTON ET AL V. VALLEY HEALTH SYSTEM ET AL STATUS HEARING RE: [1] ADVERSARY CASE 6:10-AP-01566. NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. SECTION 1452(A) BY PEGGY KIRTON, DIANA AGNELLO. NATURE OF SUIT: (14 (RECOVERY OF MONEY/PROPERTYOT HER)), (91(DECLARATORY JUDGMENT)), (02(OTHER(E.G. OTHER ACTIONS THAT WOULD HAVE BEEN BROUGHT IN STATE

	COURT IF UNRELATED TO BANKRUPTCY)))
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER CARROLL
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiffs: DANIEL BARNES, ESQ.
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MARK ATTWOOD, ESQ.
CYNTHIA EMRY, ESQ.
Jackson, Lewis, et al.
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Court Recorder: Litaun T. Lewis
United States Bankruptcy Court
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54a
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

LOS ANGELES, CALIFORNIA TUESDAY,
JANUARY 4, 2011 9:30 A.M.

—oOo—

(Call to order of the Court.)

THE COURT: Item number one, Adversary 10-1566, Kirton versus Valley Health System.

MR. KLAUSNER: Good morning, Judge Carroll. Gary Klausner, Stutman, Treister and Glatt, appearing for the Moving Party, Valley Health System, the Chapter 9 Debtor.

MR. BARNES: Good morning, your Honor. Daniel Barnes, Barnes and Barnes, on behalf of the Petitioners, Agnello—I'm sorry—Kirton and Agnello.

MR. ATTWOOD: Good morning, your Honor. Mark Attwood from the Law Firm of Jackson Lewis on behalf of the Moving Party Defendants Valley Health System Joel Bergenfeld, Vinay Rao, Michele Bird, and Valley Health System.

MS. EMRY: Good morning, your Honor. Cynthia Emry of Jackson Lewis, also on behalf of Valley Health System and the individual Defendant Trustees.

THE COURT: All right. Mr. Klausner?

MR. KLAUSNER: Your Honor, this lawsuit was filed back in August. It was removed to the Bankruptcy

Court, and we filed a motion to dismiss under Rule 12(b)(6) on behalf of Valley Health System.

As the Court is aware, Valley Health System confirmed the plan of adjustment. This Court entered an order on August 26 confirming the plan. The plan became effective, and there was no appeal from the confirmation order. So we have a final plan confirmation order. The confirmation order provided for a discharge of the Debtor's obligations and an injunction against actions against the Debtor to enforce claims that were discharged.

The allegations of this complaint over lateness against the Debtor and probably all Defendants relate to pre-petition claims by virtue of the fact that they relate to a retirement plan that was instituted by the District I think in 1971. And whatever obligations that the District had under this plan preexisted the filing of its bankruptcy case. We've cited a case called PBGC v. Bailiss—Bailey, in which the 10th Circuit clearly and expressly found that claims arising under a pre-petition retirement plan are prepetition claims even if an obligation to fund may have arisen post-petition.

So, from the standpoint of the Debtor, it's our view that this case should be dismissed with prejudice. Now, we have a procedural overlay to today's proceedings. In fact, the Petitioner, Plaintiff, has not responded to our motion to dismiss or the motion filed on behalf of the—all of the Defendants. The original response date was November 16th, and that was approximately three and a half weeks after the motion was filed. At the request of Plaintiff's counsel, we continued the hearing on our motion to dismiss and rescheduled the hearing for today. The response to our motion then became due on December 21, which was five weeks later.

So as of December 21, the Plaintiff had eight and a half weeks within which to respond to our motion and no response was filed timely. Indeed, as of today, which is another almost two weeks since the last extension expired, there still was no response to the motion. Under our local rules, if our motion is not responded to the, Court can consider that to be a consent to the relief requested.

So, as of this time, we have no response to the motion. We've no request for a further delay, and if there were one, we would oppose it.

The allegations of this complaint and, in particular, the allegations against the individual Trustees whom we've also moved—on whose behalf we've moved to dismiss are very serious. These are allegations of a very serious wrongdoing. They're alleged to have breached fiduciary duties. They're alleged to have violated California statutes and the Constitution. They're alleged to have committed constructive fraud. They're alleged to have made self-dealing. They are sued not only as trustees but in their individual capacities as well, and this is a nightmare for them individually, and they're entitled to have this case promptly resolved.

And the Plaintiff had a responsibility – having filed this lawsuit and having made those allegations, the Plaintiff had a responsibility to defend its complaint, its own complaint in a timely manner. And, as we stand here today, there has been no response to the complaint—I'm sorry—to our motion to dismiss. It's now been nearly three months since that motion was filed, and there's nothing in front of the Court that justifies the perpetuation of this lawsuit against the Debtor or against the plan trustees.

So it's our view that it would be appropriate at this time for the Court to dismiss this case with prejudice.

THE COURT: Thank you, Mr. Klausner.

MR. BARNES: Your Honor, first of all, let me point out the lead counsel, Mr. Peterson, has had some serious health issues which has caused problems in the case. But, beyond that, we—and I am relatively new in the case as well, for the reason that Mr. Peterson is not able to handle things the way he was before.

However, with that said, I want to point out that in the meet and confer under Rule 26, we on the Petitioner/Plaintiff side informed the Debtor that we would be filing a first amended complaint and that the motion to dismiss would, therefore, become moot. And, in fact, yesterday the first amended complaint was filed along with the unilateral status report, and so the—it's our view that this motion really is moot. But, at any rate, if there's going to be a dismissal, it shouldn't be with prejudice given the—the background that I've just described, given the filing of a first amended complaint.

Now, this is a very serious matter for people who were counting on retirement benefits who were only informed after the confirmation that the plan has supposedly been terminated and that their benefits are impaired. So we have—we obviously have a different view about the effect of the plan of adjustment and the effect of the confirmation order given that a lot of these liabilities, if not all of them—many of the—a large component of the liability arises post-confirmation.

Again, I have copies of the first amended complaint with me. I'm happy to distribute them. They were filed late last night.

THE COURT: I saw the first amended complaint filed late last night.

MR. BARNES: Yes.

THE COURT: My—my question is did you have the consent of the opposing parties to file that document?

MR. BARNES: Well, that's—let me say this. We—in the context of the —

THE COURT: It's a fairly easy question, just yes or no.

MR. BARNES: Well, I mean, it's not exactly a yes or no answer because it was—it was stated during the meet and confer that we would—we were going to be doing that. So whether there was—there was opposition to it or not, I don't believe there was, but is that consent?

At any rate, we don't have—we don't have filed consent, but it's our view that that was disclosed and it was discussed and no opposition was stated to that. So I would submit, your Honor, that if there—if —

THE COURT: Why wasn't a response in opposition filed to the motion itself or, in the alternative, why wasn't Rule 15 complied with by filing the amended complaint within the time proscribed by Rule 15 which would have protected you in the absence of express consent of the — of the opposing parties, because that opposing parties' consent must be in writing under Rule 15(a)(2)?

MR. BARNES: Your Honor, I can only say that I—you know, I'm new to the case and I don't know — the decisions that were made before I became involved, I can't really speak to those.

THE COURT: Are you in Mr. Peterson's office?

MR. BARNES: No.

THE COURT: Have you filed an entry of appearance in the case?

MR. BARNES: No, but we filed a notice of intent to file superseding pleadings. We haven't yet filed an appearance but I'm entering my appearance today, and I filed pleadings in the case, including about a week ago, as I said, a notice of intent to file a pleading that would supersede the petition.

I want to point out that we—the Petitioners didn't come into the Bankruptcy Court. This action was commenced in State Court. We got here through removal. But be that as it may, that doesn't excuse us from complying with the rules. I understand that.

I just wish to say, your Honor, that we have very serious—very serious claims here, people who — whose retirement benefits are in jeopardy and who, if the Debtor has its wishes, will be without remedies because the funds for recovery for funding the underfunded portion of the benefits liability, there are no—as a practical matter, there are really no other sources. So I would ask the Court to either permit us to make a motion for leave to file a first amended complaint or deem it filed so that we can get to the substance of the case.

THE COURT: Thank you, Mr. Barnes.

Mr. Klausner?

MR. KLAUSNER: Your Honor, the answer to your question is, no, we did not consent to the filing of an amended complaint. In fact, in the notice of—we filed what's called a notice of—or we made this up, notice of no opposition. We filed this on December 30 to advise the Court that this is—it's docket 15. We filed it on December 30 and essentially just advised the Court that notwithstanding the continuances that we had agreed to, that there had been no opposition filed to our motion. We also pointed out that we had been told that the Petitioners intended to file an amended complaint,

and we believed that they had no right to do that without seeking leave of Court, and they went ahead and filed their complaint late last night without even seeking legal court, nor have they responded to the motion.

As we proved in the motion to dismiss, the Petitioners were provided notice of the bankruptcy. This isn't an issue about people having been aware of the bankruptcy have been served during the course of the bankruptcy case. That was provided in our—in our request for judicial notice. So there's no dispute about that, and we didn't start the lawsuit. Petitioners did, and Mr. Peterson was their counsel, and it's not fair to us for somebody to walk into the gate and say, "Well, I'm new. I'm not responsible for the fact that this lawsuit was filed. I'm not responsible for the fact that no response was given to the motion. I'm not responsible for the fact that the rules have been violated and that nobody sought leave of Court and purported to file an amended complaint. And, frankly, there's no complaint that could be filed against the Debtor. We have a plan that discharges these claims, and we're entitled to the benefit of it. There were now plan objections by any of these people, and there's no basis to maintain this lawsuit. And, frankly, there's no amended complaint that could be filed which would circumvent the final confirmation order.

The Trustees should not be part of this case either. This is really a circumvention of the discharge, to go after these people individually and then for them to invoke their indemnity rights against the Debtor, it's just another way of trying to get back to the Debtor with claims that have been discharged.

So based upon the fact that these people had notice of the bankruptcy, did not avail themselves of

any bankruptcy remedies, we have a confirmed plan and there's been no—no response to the motion itself and the purported amended complaint is a legal nullity, there's nothing in front of you from which I think the Court could do anything other than grant our motion to dismiss with prejudice.

THE COURT: Thank you, Mr. Klausner.

All right. I have reviewed the motion, the supporting declaration and the request for judicial notice. There's no opposition to the request for judicial notice. It is granted. The Court has not received any opposition to the motion. I have to agree with Mr. Klausner.

The Defendants' Rule 12(b) motion was filed and served on October 22nd, 2010. The matter was set on regular notice. This was no surprise to the Plaintiff. It was set for hearing on November 30th, 2010. The Plaintiffs were required to file and serve written opposition not later than November 16th, 2010. No opposition was filed. By stipulation filed on November 24th, 2010, the Plaintiffs and Defendants stipulated to a continuance of the hearing to December 30th, 2010 together with an extension of time for the Plaintiffs to file their response in opposition because the Plaintiffs' counsel, as stated in the stipulation, was suffering from some medical issues.

The Court continued the hearing to January 4th, 2011. According to paragraph two of the stipulation and according to our local Bankruptcy Rule 9013-1(f), a response in opposition was to be filed and served not later than 14 days prior to today's hearing, which would have been December 21st, 2010. Plaintiffs did not file and serve a response in opposition to the motion. And, as Mr. Klausner pointed out, our local Bankruptcy Rule 9013-1(h) specifically states that the failure to file

opposition can be deemed by the Court as consent to the granting of the relief requested in the motion.

What the Plaintiffs did, instead, was to file an amended complaint late yesterday afternoon. Our local Bankruptcy Rule 7015-1(a)(3) states that a pleading will not be deemed amended absent compliance with local Bankruptcy Rule 7015-1 and Bankruptcy Rule 7015. Rule 15(a)(1), which is incorporated into Bankruptcy Rule 7015 states in pertinent part that a party may amend its pleading once as a matter of course 21 days after service of a motion under Rule 12(b).

Rule 15(a)(2) goes on to state that in all other cases a party may amend its pleading only with the opposing party's written consent or with leave of court. The Plaintiffs' amended complaint was filed after the original 21-day period expired as set forth in Rule 15(a)(1) and after the extension of that time by the stipulation between the parties to December 14th, 2010.

The Plaintiffs did not obtain Defendants' written consent to amend its complaint. Plaintiffs did not obtain leave of Court. The Plaintiffs did not seek a continuance or seek further time to respond to the motion if further time was necessary and, in conjunction with that response that the Court would have ultimately expected to the motion, set forth the reasons why leave to amend should be granted in light of the merits of the motion to dismiss.

The notice of—Respondent's notice of non-opposition which was referenced by Mr. Klausner states on page three beginning at line two Mr. Peterson and Mr. Silverstein indicated that Petitioners intended to file an amended petition in response to the motion to dismiss without seeking leave of this Court. Respondents have yet to be served with an amended petition. Moreover, any amended petition would be

untimely and should not be considered by this Court. Petitioners had only 21 days after Respondent's motion to dismiss was filed to file an amended pleading as a matter of right, citing Rule 15(a)(1)(B). The motion to dismiss was filed on October 22nd. Accordingly, any amended pleading filed as a matter of right should have been filed on or before November 12, 2010 and can no longer be timely filed.

The Court would be willing to extend that in conjunction with a stipulation to December 21st, but that was not even done. Accordingly—and the Court would finally note that the Court is not required to consider an amended pleading that was not filed in accordance with Rule (a)(15) in conjunction with the determination of the merits of a motion to dismiss under Rule 12(b), Booth v. United States, 2007 West Law 2462158, Eastern District of California, and Jones v. Marinello, 2006 West Law 2348891, Northern District of California.

So, for the reasons stated in the motion and based upon the declaration, Joel Bergenfeld in support of the motion and the request for judicial notice in support of the motion, the motion is granted. The complaint is dismissed without leave to amend.

Mr. Klausner, if you would upload a proposed order.

MR. KLAUSNER: Will do so. Thank you very much, your Honor.

THE COURT: Thank you.

ALL: Thank you, your Honor.

(Proceedings concluded.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Jordan Keilty
Transcriber

2/15/11
Date

FEDERALLY CERTIFIED TRANSCRIPT
AUTHENTICATED BY:

/s/L.L. Francisco
L. L. Francisco, President
Echo Reporting, Inc.

ARTICLE I. BOARD GOVERNANCE STATEMENT
Section 2.0 GOVERNING STATUTES

2.2 California Constitution Article XVI, Section 17
Added to Board Governance Statement on May 14, 2013

Key sections:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

a. The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system.

The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

b. The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A

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retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

c. The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

d. The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

e. The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.

f. The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.

State Laws and Regulations

Article XVI of the California State Constitution (aka "Proposition 162" or "The California Pension Protection Act of 1992")

The California Pension Protection Act of 1992 amended
Section 17 of Article XVI of the California State

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Constitution and made several changes to California's public retirement systems; the Act:

- Provided the authority for the board of each public pension system to administer the system's assets and actuarial function
- Established that each public pension board is to make providing benefits to members and beneficiaries its' highest priority
- Set forth the conditions under which the terms and conditions for board membership may change; no changes may be made unless a majority of voters in the jurisdiction of the retirement system in question approve.

California State Constitution, Article 1 §9

California case law recognizes that public pension rights are governed by statute and not contract principles. "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity [Gutierrez v. Board of Retirement, 72 Cal. Rptr.2d 837(1998); Betts v. Board of Admin., 582 P.2d 614 (Cal. 1978)].