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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NV-13-1146-TaJuKi
6	VINH CHAU and LANG MACH,)	Bk. No.	12-19953-MKN
7	Debtors.)	Adv. No.	12-01307-MKN
8	_____)		
9	CLARA BUENAVENTURA,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	VINH CHAU; LANG MACH,)		
13	Appellees.)		
14	_____)		

Argued and Submitted on January 24, 2014
at Las Vegas, Nevada

Filed - February 19, 2014

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Mike K. Nakagawa, Chief Bankruptcy Judge, Presiding

Appearances: Thomas F. Christensen of Christensen Law Offices,
LLC argued for appellant Clara Buenaventura;
A.J. Kung of Kung & Brown argued for appellees
Vinh Chau and Lang Mach.

Before: TAYLOR, JURY, and KIRSCHER, Bankruptcy Judges.

* 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 8013-1.

1 Judgment creditor Clara Buenaventura ("Creditor") appeals
2 the order of the bankruptcy court dismissing with prejudice her
3 adversary complaint against chapter 7¹ debtors Vinh Chau ("Chau")
4 and Lang Mach ("Mach," and together with Chau, "Debtors") under
5 Civil Rule 12(b)(6). We AFFIRM.

6 **FACTS**

7 In November 2006, Creditor's husband, Benjamin Buenaventura,
8 died as a result of injuries he sustained in a head-on automobile
9 collision. Chau caused the accident, as driver of a vehicle
10 owned by Mach. Creditor, along with others,² sued Debtors in
11 2007, based on negligence theories, for the wrongful death of her
12 husband ("State Court Action"). She obtained a judgment after a
13 jury trial held in 2012 ("Judgment").³

14 Debtors' insurance policy with Western United Insurance
15 Company, dba AAA Insurance Company ("AAA"), included bodily
16 injury liability limits of \$100,000 per person. In late 2006,
17

18
19 ¹ Unless otherwise indicated, all chapter and section
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
21 "Rule" references are to the Federal Rules of Bankruptcy
22 Procedure, and "Civil Rule" references are to the Federal Rules
23 of Civil Procedure.

24 ² Mrs. Buenaventura, individually and as representative of
25 Benjamin Buenaventura's estate, along with Mr. Buenaventura's
26 children and heirs, obtained the Judgment in an action initiated
27 in the Eighth District Court, Clark County, Nevada ("State
28 Court").

³ The Judgment, in excess of \$500,000, was granted in favor
of all the plaintiffs. For ease of reference, and based on the
fact that Creditor is the only named plaintiff in the adversary
proceeding at issue in this appeal (the Adversary Proceeding), we
define Creditor simply as Mrs. Buenaventura.

1 prior to filing a wrongful death action in State Court,
2 Creditor's counsel made a policy limits demand on AAA, requiring
3 payment within two weeks. AAA did not pay the policy limits at
4 that time. In 2008, AAA filed a complaint in the United States
5 District Court in Nevada⁴ ("Federal Court"), seeking declaratory
6 relief regarding the insurance policy ("Federal Court DRA"). The
7 Federal Court entered an Order on July 15, 2010, granting AAA's
8 motion for summary judgment (the "Summary Judgment Order") and
9 concluding that AAA's "liability under the insurance policy is
10 fixed at \$100,000 and [AAA's] failure to settle within the time
11 limit set by [Creditor] does not constitute bad faith under
12 Nevada law." See Adv. Dkt. #8, Ex. 1.

13 Creditor was not named as a party to the Federal Court DRA,
14 although she was allowed to intervene and she filed papers in
15 opposition to AAA's motion for summary judgment. She appealed
16 from the Summary Judgment Order. The Ninth Circuit, however,
17 dismissed her appeal based on lack of standing.⁵

18 Creditor attempted to execute on the Judgment. Her efforts
19 included seeking judicial assignment in the State Court Action of
20 any possible insurance bad faith claims or malpractice claims.
21 On August 27, 2012, Hon. Rob Bare, the judge in the State Court

22
23 ⁴ Case No.: 08-cv-00827-GMN-LRL, captioned as AAA Nevada
Insurance Company v. Vinh Chau, et al.

24
25 ⁵ During the pendency of this appeal, and after dismissal
of her appeal by the Ninth Circuit in the Federal Court DRA,
26 Creditor moved for reconsideration of the Summary Judgment Order
in the Federal Court. We take judicial notice of the order
27 signed on November 26, 2013 by Hon. Robert C. Jones in case
2:08-cv-00827, which struck the Summary Judgment Order (the "2013
28 Order"). See BAP Dkt. #24.

1 Action, verbally ordered judicial assignment of Debtors'
2 "insurance bad faith claim" and "any and all legal claims they
3 may have, including a potential attorney malpractice case," in
4 full satisfaction of the Judgment. Adv. Dkt. #21, Ex. 3.

5 The following day, August 28, 2012, Debtors filed for
6 protection under chapter 7. The Debtors included neither
7 insurance bad faith claims nor any potential attorney malpractice
8 claims in their schedules. They disclosed, however, the
9 existence of the pending litigation by Creditor against Debtors
10 and AAA in State Court regarding "insurance proceeds" in response
11 to question 4a in their statement of financial affairs.⁶

12 Thirteen days later, and weeks before the first meeting of
13 creditors, Debtors filed an amended schedule B ("Amended Schedule
14 B") and amended statement of financial affairs. In their Amended
15 Schedule B, Debtors included the following as "Other personal
16 property of any kind not already listed," valued at \$0.00:

17 Potential Attorney malpractice case: Debtors do NOT
18 believe this to be an asset as they do NOT believe
19 their attornies (sic) committed any malpractice.
20 However, Debtors have provided this amendment pursuant
21 to the request of Attorney Tom Christensen (Counsel for
22 the Bonaventuras (sic)) who has advised Debtors (sic)
23 counsel that he belives (sic) this to be an asset of
24 the Chaus.

25 Potential Bad Faith Claim: Debtors do NOT believe they
26 have a bad faith claim. They take this position
27 because among other reasons the Federal Court in case
28 number 08-00827 GMN has ruled the same. Additionally,
Debtors do not believe that their insurance company has
acted in bad faith. However, Debtors have provided
this amendment pursuant to the request of Attorney Tom

26 ⁶ We have taken judicial notice of the bankruptcy
27 schedules. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
28 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989) (reviewing court may
take judicial notice of underlying bankruptcy documents).

1 Christensen (Counsel for the Bonaventuras (sic)) who
2 has advised Debtors (sic) counsel that he believes (sic)
3 this to be an asset of the Chaus.

4 After Debtors filed the Amended Schedule B, Creditor filed
5 multiple motions in the bankruptcy case, seeking access or
6 control over the potential insurance bad faith and legal
7 malpractice claims. Despite notice of these motions, and the
8 allegations raised therein, the chapter 7 trustee ("Trustee")
9 filed a report of no distribution in the case.⁷

10 On November 27, 2012, Creditor filed a complaint seeking to
11 obtain a nondischargeable judgment against the Debtors under
12 § 523(a)(2)(A) and (a)(6), and denial of their discharges under
13 § 727(a)(2) (the "Complaint"), initiating the Adversary
14 Proceeding. Generally, the Creditor alleges that Debtors
15 committed fraud by colluding with AAA to obtain the Federal Court
16 DRA in 2010, filed bankruptcy with the intent to discharge the
17 Judgment and destroy potential bad faith claims, and concealed
18 insurance bad faith claims and legal malpractice claims by
19 failing to schedule them in their initial schedules.

20 Debtors filed a Motion to Dismiss and for Award of Attorneys
21 Fees and Costs,⁸ seeking dismissal of the Complaint pursuant to

22 ⁷ Thereafter, Creditor sought a 2004 examination of the
23 Debtors. In response, Debtors moved for a protective order,
24 which the bankruptcy court granted ("Protective Order"). In
25 footnote 5 of the Protective Order, the bankruptcy court included
26 a quotation from the Federal Court, observing Creditor's
27 counsel's modus operandi in this and other similar cases and
28 "what appear to be attempts to set up a bad faith claim."
Bk. Dkt. #75 at 6 n.5.

⁸ Creditor also filed another motion in the bankruptcy
(continued...)

1 Civil Rule 12(b)(6) ("MTD") for failure to state a claim upon
2 which relief can be granted. Creditor filed an opposition to the
3 MTD ("Opposition") and requested leave to amend the Complaint
4 pursuant to Civil Rule 15(a)(2) if the bankruptcy court found the
5 Complaint insufficiently pled.

6 The bankruptcy court took the matter under submission after
7 hearing oral arguments and entered a memorandum decision along
8 with a separate order on March 13, 2013 ("MTD Order"). The
9 bankruptcy court granted the MTD with prejudice and denied the
10 request for an award of attorneys fees. Creditor timely filed a
11 notice of appeal from the MTD Order only as to the dismissal of
12 the Adversary Proceeding.

13 JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(1) and (2)(I) and (J). We have jurisdiction
16 under 28 U.S.C. § 158.

17 ISSUE

18 Whether the bankruptcy court erred when it dismissed the
19 Adversary Proceeding.

20 STANDARD OF REVIEW

21 We review de novo the bankruptcy court's grant of a Civil
22 Rule 12(b)(6) motion to dismiss. Movsesian v. Victoria

23
24 _____
25 ⁸(...continued)
26 case, this time seeking to compel the Trustee to sell the alleged
27 choses in action to Creditor, and for relief from stay to pursue
28 the pending actions against AAA (the "Sale/Relief from Stay
Motion"). The bankruptcy court denied the Sale/Relief from Stay
Motion, and Creditor filed a notice of appeal to be heard by the
district court.

1 Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012). De novo
2 means review is independent, with no deference given to the trial
3 court's conclusion. Rule 8013. We may affirm on any basis in
4 the record. See Caviata Attached Homes, LLC v. U.S. Bank, N.A.
5 (In re Caviata Attached Homes, LLC), 481 B.R. 34, 44 (9th Cir.
6 BAP 2012).

7 **DISCUSSION**

8 In her opening brief, Creditor articulates five issues for
9 review and asks this Panel to reverse the bankruptcy court's
10 dismissal of the Adversary Proceeding and "remand for a trial on
11 all issues." Apl't Opening Brief at 3-4. Her stated issues,
12 paraphrased, consist of: whether the bankruptcy court correctly
13 applied the Civil Rule 12(b)(6) standard; whether the Protective
14 Order and lack of discovery rendered dismissal inappropriate;
15 whether the bankruptcy court erred by finding no insurance bad
16 faith claims existed and no assets were hidden; and whether the
17 bankruptcy court erred in its interpretation of the Summary
18 Judgment Order. We address each of Creditor's stated issues
19 below, in the context of the three grounds for relief contained
20 in the Complaint.

21 Creditor did not identify denial of leave to amend the
22 Complaint as an issue on appeal, nor did she include any legal
23 argument that the bankruptcy court abused its discretion by
24 denying leave to amend. We, therefore, deem this issue
25 abandoned, and we will not consider it. See Padgett v. Wright,
26 587 F.3d 983, 986 n.2. (9th Cir. 2009)(per curiam)(appellate
27 courts "will not ordinarily consider matters on appeal that are
28 not specifically and distinctly raised and argued in appellant's

1 opening brief.").

2 **A. Standards for Civil Rule 12(b)(6) dismissal**

3 A motion under Civil Rule 12(b)(6), applicable through
4 Rule 7012, challenges the sufficiency of the allegations set
5 forth in the complaint. The court's review is limited to the
6 allegations of material facts, which must be read in the light
7 most favorable to the plaintiff, and together with all reasonable
8 inferences therefrom, must be taken to be true. Pareto v. FDIC,
9 139 F.3d 696, 699 (9th Cir. 1998). The court need not accept as
10 true allegations that are merely conclusory. St. Clare v. Gilead
11 Scis., Inc. (In re Gilead Scis. Sec. Litiq.), 536 F.3d 1049, 1055
12 (9th Cir. 2008) (citation omitted).

13 Although a court generally may not consider any material
14 beyond the pleadings, Hal Roach Studios, Inc. v. Richard Feiner &
15 Co., 896 F.2d 1542, 1555 (9th Cir. 1989), matters that are
16 properly the subject of judicial notice may be considered along
17 with the complaint. MGIC Indem. Corp. v. Weisman, 803 F.2d 500,
18 504 (9th Cir. 1986). And, facts properly subject to judicial
19 notice may be used to establish that the complaint does not state
20 a claim for relief. Intri-Plex Techs., Inc. v. Crest Grp., Inc.,
21 499 F.3d 1048, 1052 (9th Cir. 2007). In this regard, a court can
22 properly take judicial notice of court papers filed in related
23 litigation. Estate of Blue v. Cnty. of Los Angeles, 120 F.3d
24 982, 984 (9th Cir. 1997). A plaintiff's memorandum in opposition
25 to a Civil Rule 12(b)(6) motion, however, cannot serve to
26 supplement or amend the complaint. See Gomez v. Ill. State Bd.
27 of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). In short, the
28 focus is on the complaint.

1 A complaint must contain either direct or inferential
2 allegations respecting all the material elements necessary to
3 sustain recovery under some viable legal theory. Bell Atl. Corp.
4 v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). The
5 plaintiff must provide grounds for her entitlement to relief,
6 which requires more than labels and conclusions; and the actions
7 must be based on legally cognizable claims. Twombly, 550 U.S. at
8 555. The court, thus, need not accept as true mere recitals of a
9 claim's elements, supported by conclusory statements; and the
10 plausibility of a claim is context-specific on review of which
11 the court may draw on its judicial experience and common sense.
12 See Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 1950
13 (2009); Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir.
14 2009) ("for a complaint to survive a motion to dismiss, the
15 non-conclusory 'factual content,' and reasonable inferences from
16 that content, must be plausibly suggestive of a claim entitling
17 the plaintiff to relief."). Dismissal is appropriate if
18 "well-pleaded facts" do not allow the court to infer "more than
19 the mere possibility of misconduct." Iqbal, 556 U.S. at 679.

20 **B. Creditor failed to state a claim under § 523(a)(2).**

21 Section 523(a)(2)(A)⁹ excepts from discharge any debt for
22 money, property, services, or an extension, renewal, or
23 refinancing of credit, to the extent obtained by false pretenses,
24 a false representation, or actual fraud, other than a statement
25

26 ⁹ Based on the Creditor's allegations, we infer, as did the
27 bankruptcy court, that while not specific, Creditor's First Claim
28 for Relief under the Complaint, seeks relief under
§ 523(a)(2)(A), not (B).

1 respecting the debtor's or an insider's financial condition. In
2 the Ninth Circuit, to prove actual fraud, a creditor must
3 establish each of five elements:

4 (1) misrepresentation, fraudulent omission or deceptive
5 conduct by the debtor; (2) knowledge of the falsity or
6 deceptiveness of his statement or conduct; (3) an
7 intent to deceive; (4) justifiable reliance by the
8 creditor on the debtor's statement or conduct; and
9 (5) damage to the creditor proximately caused by its
10 reliance on the debtor's statement or conduct.

11 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),
12 234 F.3d 1081, 1085 (9th Cir. 2000). Therefore, the Complaint
13 must contain either direct or inferential allegations respecting
14 each of these five material elements.

15 In her first claim for relief, under § 523(a)(2)(A),
16 Creditor seeks a nondischargeable judgment, in an amount to be
17 determined, based on Debtors' alleged fraudulent conduct (the
18 "Fraud Claim"). In the Complaint, Creditor asserts that the
19 Debtors colluded with AAA to obtain the Federal Court DRA
20 absolving AAA of bad faith on the issue of the time-limit demand.
21 In support, Creditor alleges that Debtors admitted in their
22 petition and at the 341(a) hearing that AAA did not act in bad
23 faith, thus, according to Creditor, proving that the Federal
24 Court DRA was contrived and collusive. In addition, Creditor
25 alleges that Debtors, through their counsel, "represented that
26 they would follow the court's ruling assigning their claims to
27 [Creditor], knowing they would be filing bankruptcy in an effort
28 to destroy the claims." Adv. Dkt. #1 at ¶34. The balance of the
allegations in support of the Fraud Claim consist of labels,
paraphrased elements of a generic fraud claim, and conclusory
statements.

1 On its face, the Complaint fails to state a plausible claim
2 against Debtors for fraud.¹⁰ Even accepting as true Creditor's
3 allegation that Debtors "did not believe there was any wrongdoing
4 on the part of AAA," Creditor does not allege that Debtors could
5 have prevented the Federal Court from entering the Summary
6 Judgment Order if they had disclosed their belief. Nor does
7 Creditor allege that Debtors knowingly kept silent and intended
8 to deceive by doing so. Creditor also failed to plead any actual
9 reliance by her, or that she suffered any damages as a proximate
10 result of issuance of the Summary Judgment Order.¹¹ We cannot
11 simply infer all the missing material elements of Creditor's
12 Fraud Claim from the sparse factual allegations contained in the
13 Complaint.

14 Nor does Creditor adequately state a claim under
15 § 523(a)(2)(A) in the one sentence allegation that Debtors
16 misrepresented that they would abide by the State Court's
17

18 ¹⁰ At oral argument, the bankruptcy court asked Creditor's
19 counsel if he was arguing that the Debtors "defrauded Judge
20 Navarro [at the Federal Court]?" Hr'g Tr. (January 9, 2013) at
21 19. He agreed. At appellate oral argument, Creditor's counsel
22 argued that the Debtors' fraud on the Federal Court justified
23 Creditor's collateral attack on the Summary Judgment Order. We
conclude herein that neither of these arguments aid the
plausibility of Creditor's Fraud Claim against the Debtors.

24 ¹¹ As stated above in footnote 5, the Summary Judgment
25 Order has since been stricken and is no longer in effect. At
26 oral argument in this appeal, the Panel asked Creditor's counsel
27 how Creditor's alleged claims against the Debtors are impacted by
28 having the Summary Judgment Order stricken. Counsel argued that
Creditor's § 523 claims were validated by the 2013 Order striking
the Summary Judgment Order. He could not explain how, and we
find this argument illogical.

1 judicial assignment ruling, knowing they would be filing
2 bankruptcy. Again, Creditor fails to plead the other necessary
3 elements of fraud: intent to deceive, reliance, and damages as a
4 proximate result thereof. Thus, we determine that the bankruptcy
5 court appropriately dismissed the Fraud Claim; as pled it was
6 insufficient.

7 **C. Creditor failed to state a claim under § 523(a)(6).**

8 Section 523(a)(6) provides that a debtor may not discharge a
9 debt "for willful and malicious injury by the debtor to another
10 entity or to the property of another entity." See Barboza v. New
11 Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008).
12 Both willfulness and maliciousness must be alleged and proven and
13 the malicious injury requirement is separate from the willful
14 injury requirement. Carrillo v. Su (In re Su), 290 F.3d 1140,
15 1146-47 (9th Cir. 2002) (conflating the two requirements is
16 grounds for reversal). Tortious conduct is a required element of
17 a § 523(a)(6) claim. Lockerby v. Sierra, 535 F.3d 1038, 1040
18 (9th Cir. 2008).

19 Here, Creditor bases her second claim for relief, under
20 § 523(a)(6), on the same allegations Creditor made in support of
21 her Fraud Claim plus alleged "further willful and malicious
22 conduct" by Debtors. Adv. Dkt. #1 at ¶42. Creditor asserts in
23 the Complaint that Debtors' alleged misconduct includes: "filing
24 bankruptcy with the intent of destroying the claims assigned to
25 [Creditor], attempting to have the wrongful death judgment
26 discharged in the bankruptcy, obtaining [the Summary Judgment
27 Order] by collusion, and hiding assets in an attempt to
28

1 defraud."¹² Id.

2 Other than perhaps the vague reference to "attempt to
3 defraud,"¹³ Creditor fails to allege tortious conduct by the
4 Debtors that, if proven, could support a nondischargeable claim
5 under § 523(a)(6). The Judgment, which was based purely on
6 negligence, is dischargeable in bankruptcy as a matter of law.
7 Therefore, intending such a legitimate consequence can not
8 support a tort under state law. Even if Debtors filed bankruptcy
9 with the specific intent to stop entry of an order on Judge
10 Bare's judicial assignment, nothing is inherently wrong with such
11 an intention. One of the purposes underlying bankruptcy law is
12 to achieve a level playing field for a debtor's creditors. Many
13 bankruptcy filings appropriately are timed to prevent an
14 aggressive creditor, with whom negotiations have stalled or
15 failed, from obtaining an advantage over other creditors; or even
16 just to stop litigation. And, even if an order on the judicial
17 assignment were entered prior to the petition date here, it could
18 conceivably be subject to challenge and avoidance as a
19 preference. See 11 U.S.C. § 547.

20 Thus, the Creditor's willful and malicious injury
21 allegations fail to state a claim under § 523(a)(6) and we
22 determine the bankruptcy court did not err by dismissing this
23

24 ¹² As with the Fraud Claim, the Complaint includes a few
25 additional paragraphs in support, but they consist of labels,
26 paraphrased bare elements of a § 523(a)(6) claim mixed with fraud
elements, and conclusory statements.

27 ¹³ As discussed above, the Complaint fails to state a claim
28 for recovery on a fraud theory and the inclusion of "hiding
assets" does not cure the deficiencies.

1 claim; as pled, the § 523(a)(6) claim was insufficient.

2 **D. Creditor did not state a claim under § 727(a).**¹⁴

3 Section 727(a)(2) provides that the court shall grant the
4 debtor a discharge, unless-

5 the debtor, with intent to hinder, delay, or defraud a
6 creditor or an officer of the estate charged with
7 custody of property under this title, has transferred,
8 removed, destroyed, mutilated, or concealed, or has
9 permitted to be transferred, removed, destroyed,
10 mutilated, or concealed-

(A) property of the debtor, within one year before the
date of the filing of the petition; or

(B) property of the estate, after the date of the
filing of the petition

11 Simply stated, Creditor alleges that Debtors failed to
12 disclose in their original schedules the possible insurance bad
13 faith claims and potential legal malpractice actions, thus
14 concealing assets within one year of filing, and continuing the
15 concealment after filing. She argues on appeal that the
16 bankruptcy court erred by construing facts in a light most
17 favorable to the Debtors rather than Creditor, contrary to the
18 Civil Rule 12(b)(6) standard, disregarding uncontroverted
19 affidavits valuing the possible bad faith claims, and finding
20 that Debtors did not attempt to conceal any claims.

21 As a preliminary matter, we determine that the bankruptcy
22 court did not err by disregarding "affidavits" that were

23
24 ¹⁴ Creditor's opening brief on appeal contains extensive
25 argument regarding application of judicial estoppel: arguing
26 both that Debtors should be judicially estopped from arguing that
27 bad faith claims exist and judicially estopped from arguing they
28 do not exist. Not only are these arguments nonsensical, a
judicial estoppel argument is inappropriate on review of a
dismissal under Civil Rule 12(b)(6), and we do not address it
further herein.

1 apparently submitted by Creditor in connection with another
2 motion she filed in the bankruptcy case. A Civil Rule 12(b)(6)
3 motion involves review of the pleadings for sufficiency, not
4 review of evidentiary submissions unless the bankruptcy court,
5 pursuant to Civil Rule 12(d), determines to treat the motion as
6 one for summary judgment under Civil Rule 56. The bankruptcy
7 court did not do so here. Thus, the bankruptcy court did not err
8 by disregarding the affidavits.

9 We also note that the bankruptcy court determined, based in
10 part on its review of the Summary Judgment Order, that Debtors
11 had no legal basis to schedule possible insurance bad faith
12 claims against AAA. In light of the 2013 Order, any reliance
13 placed on judicial notice taken of the Summary Judgment Order is
14 no longer appropriate, and could be considered error. As
15 discussed below, however, such error would be harmless.
16 Moreover, reliance on the Summary Judgment Order is not critical
17 to our conclusion that Creditor's § 727(a)(2) claim is not
18 plausible.

19 Specifically, the Complaint includes the following
20 paragraphs¹⁵ in connection with Creditor's § 727(a)(2) claim:

21 ¶15. During AAA's handling of the liability claims
22 against the [Debtors], AAA made a number of claims
23 handling failures which gave the [Debtors] certain
24 causes of action against AAA (the "Claims").

25 ¹⁵ Creditor incorporated all earlier pled paragraphs into
26 the specific claim for § 727(a)(2) relief. We do not quote all
27 the paragraphs of the Complaint that contain mere conclusory
28 statements, but focus on the paragraphs from which we may
determine the plausibility/implausibility of Creditor's
§ 727(a)(2) claim.

1 ¶16. Under Nevada law, because of AAA's claims
2 handling failures, it is liable for all amounts owed by
3 the [Debtors] to [Creditor] above the \$100,000 policy
4 limits.

5 ¶24. Furthermore, as admitted in their petition and
6 341 meeting, they did not believe there was any
7 wrongdoing on the part of AAA proving that the
8 declaratory relief action was contrived and collusive.
9 See Amended Schedule B.

10 ¶27. On August 27, 2012, Hon. Rob Bare verbally
11 ordered the bad faith claims and legal malpractice
12 claims¹⁶ the Debtors had against AAA and their
13 attorneys would be assigned to [Creditor] and the
14 [Debtors] would cooperate in evaluating and bringing
15 the claims, in full satisfaction of the judgment.

16 ¶29. The [D]ebtors did not list or hid (sic) the
17 assets of their claims against AAA.

18 ¶30. Debtors have not been forthcoming with the
19 officers of the estate in regards to their assets,
20 including their claims against AAA and other related
21 issues to their fraudulent and deceitful behavior.

22 ¶42. That this further willful and malicious conduct
23 included, but is not limited to, filing bankruptcy with
24 the intent of destroying the claims assigned to
25 [Creditor], attempting to have the wrongful death
26 judgment discharged in the bankruptcy, obtaining a
27 Federal DRA judgment by collusion, and hiding assets in
28 an attempt to defraud.

Fourth Claim for Relief¹⁷

¶47. Debtors, with the intent to hinder, delay, and
continually defraud [Creditor] and the officers of the
estate charged with custody of the property (sic), has
(sic) concealed property of the debtor, within one yer
before the date of the filing of the petition and
property of the estate since the filing of the
petition.

¶49. That Debtor, (sic) contrary to information

¹⁶ This is one of only three limited references to
malpractice claims contained in the Complaint. The other two
references are equally skeletal and conclusory.

¹⁷ The Complaint does not contain a "Third Claim for
Relief."

1 contained in the petition and testified to by Debtors
2 in the 341 Creditors' Meeting, have valuable claims
3 against AAA and legal malpractice claims against their
4 attorneys.

5 ¶50. That this conduct by Debtors was fraudulent and
6 malicious.

7 Adv. Dkt. #1.

8 **1. Possible insurance bad faith claims**

9 The sufficiency of the § 727(a)(2) claim, in substantial
10 part, turns on the sufficiency of Creditor's assertion that
11 insurance bad faith claims exist,¹⁸ as well as her allegation
12 that Debtors intentionally concealed the existence of such
13 claims. Embedded in Creditor's allegations are legal conclusions
14 regarding the existence of insurance bad faith claims, asserted
15 by Creditor as fact, without legal (or factual) support. These
16 conclusions do not logically flow from factual allegations in the
17 Complaint; they are not otherwise supportable; and, thus, they
18 are not entitled to the presumption of truth. We, therefore,
19 find Creditor's bare assertions do not establish a plausible
20 § 727(a)(2) claim.

21 Our Civil Rule 12(b)(6) plausibility analysis is informed
22 not only by evaluation of the Complaint itself, but by our common
23 sense and judicial experience. As was the bankruptcy court, we
24 are aware of Creditor's prepetition attempt to execute on the
25 Judgment by seeking judicial assignment of potential insurance
26 bad faith claims, coupled with a requirement that the Debtors
27 cooperate fully in identifying and bringing such claims. In

28 ¹⁸ A minor part of the § 727(a)(2) claim is based on the
sufficiency of Creditor's assertion that legal malpractice claims
exist, which we separately address below.

1 addition, we are aware of the multiple unsuccessful, or
2 withdrawn, motions filed by Creditor in the bankruptcy case,
3 directed toward discovery attempts in order for Creditor to
4 identify facts to support the potential bad faith claims (i.e.,
5 the 2004 exam quashed by the Protective Order), and/or
6 acquisition by Creditor of authority to pursue the potential
7 claims in other courts. It is apparent that Creditor's
8 perspective is that of a person not privy to the relationship
9 between the insurer (AAA) and the insureds (Debtors), the
10 relationship from which any insurance bad faith claims must
11 necessarily arise. And it is apparent that, during the five-plus
12 years of prepetition litigation, Debtors did not pursue insurance
13 bad faith claims against AAA, a fact consistent with the
14 Creditor's allegation that Debtors did not believe there was any
15 wrongdoing committed by AAA.¹⁹

16 Creditor merely asserts that AAA made "claims handling
17 failures" for which AAA is liable to Debtors for all liability in
18 excess of policy limits.²⁰ The foundation for Creditor's
19

20 ¹⁹ Which we note is entirely consistent with the Amended
21 Schedule B.

22 ²⁰ In Nevada, insurance claims handling standards are set
23 forth in Nevada Revised Statute § 686A-310. The statute lists
24 six activities considered to be unfair practices and provides
25 that an "insurer is liable to its insured for any damages
26 sustained by the insured as a result of the commission of any act
27 set forth in subsection 1 as an unfair practice." N.R.S.
28 § 686A.310(2). This statutory provision does not state that
claims handling failures automatically entitle an insured to all
amounts in excess of policy limits, as Creditor alleges in the
Complaint. Creditor does not identify any particular misconduct

(continued...)

1 allegation that Debtors failed to disclose a valuable asset is no
2 more than a mere possibility that such asset exists. The
3 Complaint fails to sufficiently allege that Debtors have any
4 legal basis to file insurance bad faith claims against AAA. The
5 mere possibility that such claims exist²¹ does not support a
6 plausible claim that Debtors concealed a valuable asset.²²

7 Creditor argues that she was prevented, by the Protective
8 Order, from conducting discovery into facts that could support
9 the insurance bad faith claims. She argues that because the
10 Adversary Proceeding was dismissed before discovery could be
11 taken, “[i]t was impossible for [Creditor] to gather any more
12 information then (sic) was previously provided to the court
13 regarding the claims” Apl’t Opening Brief at 23. But,
14 as discussed by the Supreme Court in Iqbal, a complaint that does

15
16 ²⁰(...continued)
17 by AAA nor does Creditor allege that Debtors suffered any damages
18 as a result thereof.

19 ²¹ On appeal, Creditor argues that the “possibility” cannot
20 “be foreclosed that AAA failed to settle” and “there is no
21 evidence” that “offers were adequately communicated.” Apl’t
22 Opening Brief at 23 and 21, respectively. Such additional
23 alleged possibilities, even if they could appropriately be
24 considered when raised for the first time on appeal, would not
25 render Creditor’s claims plausible.

26 ²² In addition, we note that in their original statement of
27 financial affairs filed with their petition, Debtors disclosed
28 the existence of the pending litigation in State Court regarding
“insurance proceeds.” This disclosure, of which we may take
judicial notice, is facially inconsistent with Creditor’s
conclusory allegation that Debtors concealed the existence of the
disputed claims, and would serve to alert the Trustee to the need
to explore the pending litigation on behalf of all creditors of
the estate.

1 not state a plausible claim for relief, "does not unlock the
2 doors of discovery for a plaintiff armed with nothing more than
3 conclusions." Iqbal, 556 U.S. at 678-79. The plausibility
4 requirement, therefore, appropriately serves as a barrier to
5 discovery when not established.

6 We acknowledge that Creditor's Judgment is based on
7 Creditor's loss of her husband under horrible circumstances.
8 Nonetheless, Creditor's loss was caused by Chau's negligence, not
9 by any intent to cause harm. And, as the Judgment is based on
10 negligence, it is fully dischargeable in Debtors' bankruptcy case
11 as a matter of law. The Complaint appears to be driven by
12 Creditor's desire to obtain and prosecute unfiled insurance bad
13 faith claims as a means to collect more of the amount of the
14 Judgment than will be possible in Debtors' "no asset" chapter 7
15 bankruptcy case. Creditor's attempt to collect through other
16 types of claims requires legal justification. Creditor concedes
17 that Debtors have disavowed any basis for the claims, and the
18 Trustee determined not to pursue them on behalf of the estate.
19 We, therefore, conclude that the Complaint cannot pass the Iqbal
20 plausibility standard by hoping and insisting that the claims
21 exist; as pled the § 727(a)(2) claim based on alleged insurance
22 bad faith claims is insufficient.

23 **2. Potential legal malpractice claims**

24 On appeal, Creditor argues that the bankruptcy court
25 disregarded the potential attorney malpractice claims. The
26 bankruptcy court's Memorandum Decision did not directly discuss
27 the Complaint's allegations regarding the legal malpractice
28 claim. The bankruptcy court acknowledged, however, that, as

1 stated in the Amended Schedule B, Debtors did not believe they
2 existed. The bankruptcy court also noted that Creditor had
3 attempted to examine the Debtors pursuant to Rule 2004 concerning
4 potential attorney malpractice claims along with the possible
5 insurance bad faith claims. At oral argument in this appeal,
6 Creditor's counsel represented to the Panel that Creditor did not
7 know whether the Debtors retained their own counsel or if counsel
8 was retained by the insurer, a question that Creditor sought
9 answers for through discovery that was blocked by the Protective
10 Order.

11 Based on our review of the record here, we determine that
12 the Complaint's reference to legal malpractice claims suffers
13 from the same deficiencies as discussed above with respect to the
14 possible insurance bad faith claims. The Complaint is devoid of
15 allegations that Debtors had any grounds to commence suit against
16 any attorney - for any reason. The Complaint only mentions legal
17 malpractice claims as possibilities that Creditor, in essence,
18 wants to explore. That desire is not enough to establish the
19 plausibility that a claim exists. Not only does this desire fail
20 to support a § 727(a)(2) claim, we are mindful that no existing
21 bankruptcy policy would be served by encouraging third parties to
22 initiate litigation against debtors' pre-bankruptcy attorneys
23 based only on unsupported speculation; as pled the § 727(a)(2)
24 claim based on alleged malpractice claims is insufficient.²³

25
26 ²³ Assignment of unfiled potential legal malpractice
27 claims, if grounds were sufficiently alleged to exist, is not
28 permitted under Nevada law. See Chaffee v. Smith, 98 Nev. 222,
(continued...)

1 **CONCLUSION**

2 Based on the foregoing, we AFFIRM the bankruptcy court's
3 dismissal of the Adversary Proceeding.
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22 ²³(...continued)
23 224; 645 P.2d 966 (1982) (public policy prevents the transfer of
24 a previously unasserted claim for legal malpractice because "the
25 decision as to whether to bring a malpractice action against an
26 attorney is one peculiarly vested in the client".). Here, both
27 the attorney-client privilege and the right to file any suit
28 based on legal malpractice claims are held by the Trustee, not
the Debtors. And we note that Trustee determined that such
claims held no value for the chapter 7 estate, presenting another
layer of impediment to Creditor's ability to plausibly allege a
claim for legal malpractice.