14
PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
KAREL ROCHA, SBN 212413
krocha@pnbd.com
2122 North Broadway, Suite 200
Santa Ana, California 92706-2614
Phone No.: (714) 547-2444
Fax No.: (714) 835-2889

Attorneys for THE GOLDEN 1 CREDIT UNION, a California corporation

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

In re MEGAN CHRISTINE FIEDLER, Debtor.	Case No. 23-20862 Chapter 7 Adv No. 23-02038-C
THE GOLDEN 1 CREDIT UNION, a California corporation, Plaintiff, v. MEGAN CHRISTINE FIEDLER, an individual, Defendant.	**RESPONSE OF PLAINTIFF AND PLAINTIFF'S COUNSEL TO COURT'S AUGUST 2, 2023 ORDER TO SHOW CAUSE** Hearing – Date: August 22, 2023 Time: 10:00 a.m. Dept: C Ctrm: 35 Place: 501 I Street, 6th Floor, Sacramento, California Judge: Hon. Christopher M Klein

Plaintiff The Golden 1 Credit Union and its counsel, Karel Rocha, Esq., and the law firm of Prenovost, Normandin, Dawe & Rocha ("Plaintiff's Counsel"), respectfully submit this Response to the Court's Order to Show Cause (the "Response"), in advance of the hearing set for August 22, 2023.

/ / /

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

I. INTRODUCTION

As is often the case with pleadings viewed with the benefit of hindsight, Golden 1 and its Counsel acknowledge that they could have made more pointed allegations to connect the underlying facts regarding Debtor Megan Fiedler's immediate default with the legal theory of fraud pled in the Adversary Complaint. That said, first payment defaults of the kind Golden 1 observed here are recognized by financial regulators as potential indicators of fraud. The strength of that correlation may vary by type of debt and will ultimately depend on each particular set of facts, but it is a correlation all the same. As demonstrated in more detail below, Golden 1 and its Counsel therefore had a reasonable basis for filing the Adversary Complaint against Debtor, and did not do so for any improper purpose.

Golden 1 takes very seriously the concerns that the Court has expressed in its Order to Show Cause, and accordingly its senior management is committing to take specific action in response to those concerns. Golden 1 has suspended new adversary filings pending an independent legal review of its pending adversary complaints. If warranted by the outcome of that review, Golden 1 may make adjustments to its policies, procedures, and litigation practices.

II. FACTUAL BACKGROUND

A. Golden 1 Credit Union

Golden 1 is a not-for-profit financial cooperative organized under the laws of the State of California, and subject to the oversight and supervision of the National Credit Union Administration, the California Department of Financial Protection and Innovation, and the Consumer Financial Protection Bureau. As a financial cooperative, Golden 1 conducts its business for the mutual benefit and general welfare of its members with the earnings, savings, benefits, or services of the credit union being distributed to its members as patrons. see generally Cal. Fin. Code §14002.)

Golden 1 is committed to pursuing debt collection responsibly and in compliance with all laws and has policies and procedures in place to promote compliance.

/ / /

/ / /

/ / /

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

B. Debtor Megan Fiedler's Loan and Bankruptcy Filing; Golden 1's Adversary Complaint

On November 3, 2022, Debtor Megan Fiedler entered into a written Closed-End Note, Disclosure, Consumer Loan and Security Agreement ("Note") to obtain a loan from Golden 1. (Declaration of Beth Miller ("Miller Decl."), ¶¶12-13 & Exhibit[1] B.) Per the terms of the Note, Debtor was to make monthly payments to Golden 1 beginning on December 20, 2022 in the amount of $197.79. (Miller Decl., ¶¶14-15 and Exhibit B.) Debtor defaulted on the loan immediately; she did not make her first payment due the month after she obtained the loan, and has never made any payments due thereafter. (Miller Decl., ¶¶16-17 & Exhibit C.)

On March 21, 2023, 138 days after she obtained the loan and executed the Note, Debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code.

As set forth in the accompanying declaration of Plaintiff's Counsel Karel Rocha, when Counsel reviewed Debtor's bankruptcy schedules, several facts stood out. For instance, the schedules showed that Debtor's monthly expenses were only $19.54 more than her monthly take-home income, and Debtor stated that she did not anticipate an increase or decrease in her expenses in the year after filing her Petition. (Declaration of Karel Rocha ("Rocha Decl."), ¶¶16-18 & Exhibit D.) Additionally, Debtor listed what appeared to be an unusually high monthly transportation expense (which was in addition to her monthly car loan payment and auto insurance payment) and a monthly entertainment expense of $200. (Rocha Decl., ¶19 & Exhibit D.) The latter was noteworthy because Debtor's monthly payment on her loan with Golden 1 was less than the $200.00 she claimed in monthly entertainment expenses. Finally, Counsel noted possible discrepancies between the income and expense figures Debtor listed in her schedules and the income and liabilities she had provided to Golden 1 in her loan application (noting that the "expenses in the schedules may be broader than the liabilities listed on the application). (Rocha Decl., ¶¶16-19 & Exhibits A and D).

[1] All references herein to Exhibits are to the set of Exhibits in Support of Plaintiff and Plaintiff's Counsel's Response to Order to Show Cause, concurrently filed herewith.

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

Based on his review of Debtor's bankruptcy schedules and her loan file, Plaintiff's Counsel determined that the facts raised certain indicia of fraud. Most prominently, and as alleged in the Adversary Complaint, Debtor defaulted on the loan within the first payment cycle, without any payments having been made. Other considerations not specifically pled in the complaint, but nonetheless evident from the Debtor's filing, included the less than $20.00 in monthly expenses that Debtor claims she could not pay as grounds for filing for bankruptcy, particularly when juxtaposed against the $200 a month in entertainment expenses that Debtor also claimed. (Rocha Decl., ¶22.) Following the review of Golden 1's file, Debtor's Petition and Schedules, and after obtaining approval from Golden 1, on April 25, 2023, Plaintiff's Counsel filed the Adversary Complaint, which alleged one claim of fraud against Debtor. (Rocha Decl., ¶¶23-24 & Exhibit E.) In addition to pointing in the Complaint to the indicia of fraud (the immediate default and failure to make any payments), the Complaint also alleges that Debtor made material misrepresentations regarding the debt. (Exhibit E, ¶10 at 2:20-21.)

The claims stated in the Adversary Complaint are based on the facts in the loan file, the surrounding timeline of events, the information Debtor stated in her Schedules of her Bankruptcy Petition, and were not made frivolously. (Rocha Decl., ¶29.)

III. RELEVANT PROCEDURAL BACKGROUND

In response to Golden 1's Adversary Complaint, Debtor filed a document titled "Defendant's Statement of Undisputed Facts in Support of Her Motion for Bankruptcy," wherein she alleged that she obtained the loan from Golden 1 with the intention of paying it back. The Court treated this document as an answer to the Complaint.

At the Status Conference held on June 28, 2023, the Court expressed skepticism about Golden 1's theory of the case. The Court dispensed with discovery and other pretrial procedures and set the matter for trial on July 18, 2023. On July 5, 2023, Golden 1, through its counsel, applied to the Court for an order dismissing the adversary action. [Docket # 15] On July 7, 2023 the Court granted the request to dismiss, and noted that an Order to Show Cause would be forthcoming. [Docket # 17]. On August 2, 2023, the Court issued that Order to Show Cause. Therein, the Court directed Golden 1 and Counsel to show cause why Federal Rule of Bankruptcy Procedure 9011(b)

was not violated by the filing of the Adversary Complaint and why sanctions should not on that account be imposed against Golden 1 and Counsel. Additionally, the Court directed Golden 1 to show cause why it should not make an award under 11. U.S.C. 523(d) to Debtor.

For the reasons set forth below, the Court should discharge the Order to Show Cause, and should not impose sanctions or make any award against Golden 1 or its Counsel.

IV. LEGAL ARGUMENT

As relevant here to the Court's Order to Show Cause, Federal Rule of Bankruptcy Procedure 9011(b) provides that when a pleading is presented to the Court, an attorney certifies that, to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) the pleading it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation, (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law, and (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, **are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery**. Fed. R. Bankr. P. 9011(b) (bold added for emphasis).

Because the "pertinent language of these rules [Rule 9011 FRBP and Rule 11 FRCP] is virtually identical, authorities analyzing Rule 11 are applicable to the Rule 9011 analysis." *In re Rainbow Magazine, Inc*., 136 B.R. 545 (9th Cir. BAP 1992), aff'd after remand, 77 F.3d 278 (9th Cir. 1996); BAP decision superseded on other grounds as noted by *In re Lapin*, 226 B.R. 637, 641 (9th Cir. BAP 1998).

A. The Adversary Complaint Was Not Filed for an Improper Purpose.

Regarding Fed. R. Bankr. P. 9011(b)(1), the complaint was not filed for an improper purpose and there are no facts that suggest that any such purpose was present here. The standard for what constitutes an improper purpose was summed up in *In re* Lawrence as follows:

> An improper purpose is generally found where the evidence shows that the party against whom sanctions are sought has engaged in a pattern of abusive litigation for the purpose of delay or harassment. See *Aetna Life Ins*. *534 *Co. v. Alla Med. Servs., Inc*., 855 F.2d 1470, 1476 (9th Cir.1988). Whether a party has been harassed is based on

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

> an objective standard. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir.1986) (harassment focuses on improper purpose of signer, objectively tested, rather than consequences of signer's act, subjectively viewed by signer's opponent). Although the court acknowledges that Lawrence feels that he has been inconvenienced by being forced to defend against the Complaint, the court does not find evidence of a pattern of abusive litigation or harassment in this case. The court will not infer an improper purpose from the fact that it has found a violation of Bankruptcy Rule 9011(b)(2). See *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc*., 186 F.3d 157, 176–177 (2d Cir.1999).

In re Lawrence, 494 B.R. 525, 533–34 (Bankr. E.D. Cal. 2013)

The *Lawrence* court went on to state that, when determining whether sanctions are warranted under Rule 9011(b), the court "must consider both frivolousness and improper purpose on a sliding scale;" "where the more compelling the showing as to one element, the less decisive need be the showing as to the other." *Id.* at 530-531.

For sanctions purposes under Rule 9011, "attorney conduct is measured objectively against a reasonableness standard, which consists of a competent attorney admitted to practice before the involved court." *Valley Nat'l *531 Bank of Ariz. v. Needier (In re Grantham Bros.)*, 922 F.2d 1438, 1441 (9th Cir.1991) (citation omitted). "A claim is frivolous if it is both baseless and made without a reasonable and competent inquiry." *Id.* at 1442 (internal quotation marks and citation omitted). And, "[a]lthough the term 'improper purpose' can be construed to require an improper subjective intent, this court analyzes an allegedly improper purpose under an objective standard." *Id.* at 1443.

Generally, when courts have found improper purpose, they have done so in circumstances where a litigant has engaged in a pattern of abusive or harassing behavior. *In re Lawrence, supra* at 533. No such pattern exists here. Golden 1 timely filed its Adversary Complaint based on the facts available to it and its Counsel, and those discovered from reviewing Debtor's Petition and Schedules, which contained indicia of fraud. Golden 1 and its Counsel then promptly moved to dismiss the Complaint after the first status conference and after Debtor filed her response. Golden 1 and its Counsel took the concerns expressed by the Court regarding Golden 1's theory of fraud seriously, and after consideration, promptly moved to dismiss the Adversary Complaint.

Notwithstanding the above, as a result of the Court's concerns, with the assistance of separate outside counsel, Golden 1 has suspended the filing of new adversary filings pending an

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

independent legal review of its pending adversary complaints and, if warranted by the outcome of that review, Golden 1 may make adjustments to its policies, procedures, and/or litigation practices.

B. The Claim of Fraud Was Warranted by Existing Law or by a Nonfrivolous Argument for the Extension, Modification, or Reversal of Existing Law.

Regarding Fed. R. Bankr. P. 9011(b)(2), a filing is frivolous if it is "**both** baseless and made without a reasonable and competent inquiry." *Townsend v. Holman Consulting Corp*., 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) (bold added for emphasis).

Underlying the Court's Order to Show Cause is its conclusion that the Complaint rested on a logical fallacy. More specifically, the Court concluded that the two concrete facts in the Complaint "were fallacious per se," discounting the possibility of a correlation between a first payment default and fraud in the inducement.

But there is a correlation, as industry sources attest. So called "first payment" or "early payment" defaults on consumer and home loans are recognized by financial regulators and industry sources as having a logical correlation to fraud. For example, the Office of Comptroller of the Currency's Handbook includes a discussion about how most banks use some kind of proxy, "such as early payment default," to "assist in identifying potential fraud . . ." (U.S. Department of the Treasury, *Credit Card Lending, Comptroller's Handbook* (2021) Version 2.0, Pg. 53, https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/pub-ch-credit-card.pdf). Similarly, Freddie Mac has published guidelines recognizing first and early payment defaults as a fraud red flag. (See Exhibit G). Indeed, a financial institution's failure to monitor for early pay defaults and to take corrective action when fraud is detected based on that monitoring, can contribute to significant fines and penalties. U.S. Department of Justice, Office of Public Affairs, *Wells Fargo Bank Agrees to Pay $1.2 Billion for Improper Mortgage Lending Practices* (2016) https://www.justice.gov/opa/pr/wells-fargo-bank-agrees-pay-12-billion-improper-mortgage-lending-practices. (Exhibit H). So called "early payments defaults" on consumer and home loans are recognized by financial regulators and industry sources as having a logical correlation to fraud. National Credit Union Administration, *Mortgage Loan Fraud Report* (2008), modified on October 1, 2020, https://ncua.gov/regulation-

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

supervision/letters-credit-unions-other-guidance/mortgage-loan-fraud-report (noting the early payment defaults were noted in approximately 5% of mortgage fraud narratives). (Exhibit F)

In its Order to Show Cause, the Court opined that the Complaint's allegations flunk the specificity pleading requirements of Federal Bankruptcy Rule 7009 and Federal Rule of Civil Procedure 9(b). Here, the question is not whether there is a logical correlation to be drawn between first payment default and fraud (because there is), but the strength of that correlation based on the facts. Golden 1 believes the correlation is reasonably strong.. For example, industry studies and sources draw a high correlation between first payment defaults and fraud, particularly when other circumstances are present. (See Request for Judicial Notice, Exhibits F, G, & H.)

Moreover, other courts have found that: "'[F]raudulent intent has been inferred from such circumstances as defendant's insolvency, [her] hasty repudiation of the promise, [her] failure even to attempt performance, or [her] continued assurances after it was clear [she] would not perform.'" *Aliya Medcare Fin., Ltd. Liab. Co. v. Nickell*, 156 F. Supp. 3d 1105, 1130 (C.D. Cal. 2015) [citing *Tenzer v. Superscope*, 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212 (1985)]. (See also *Fitz v. Islands Mech. Contractor, Inc*., No. 2008-060, 2013 U.S. Dist. LEXIS 125142, at *23–24 (D.V.I. Sep. 3, 2013) finding that an inference regarding a sufficient basis upon which the court found Defendant's repudiation of his promise within a month of making the promise "provided a legally sufficient basis for a jury to reasonably infer that Defendant had knowledge or intent with respect to the false statement at the time the statement was made."

However, Golden 1 and its Counsel acknowledge that allegations of this kind were not developed in the Complaint. With the benefit of hindsight, Golden 1 and its Counsel agree with the Court that the allegations in its Adversary Complaint should have been more specific. Even so, pleading deficiencies of this kind should generally be remedied, if in fact they can be remedied to the Court's satisfaction, through amendments to the pleadings.

/ / /

/ / /

/ / /

/ / /

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

Certainly, the Adversary Complaint was not baseless such that it warrants sanctions under Rule 9011(b)(2). *Townsend v. Holman Consulting Corp*., 929 F.2d 1358, 1362 (9th Cir. 1990). Taken as a whole in light of the regulatory environment under which Golden 1 operates, the allegations in the Adversary Complaint had a reasonable basis.[2]

In regards to Paragraph 14 of the Adversary Complaint, said paragraph states: "The Defendant's obligations to Plaintiff are not consumer debts as defined in 11 U.S.C. § 101(8) to the extent that they were based upon fraud and willful, malicious, and tortious injury to Plaintiff." This paragraph was not made for any improper purpose nor was it made for any unwarranted legal contention; rather, it is based on the contention that if a person obtains money from a creditor through a loan but does so with fraudulent intent, then that person should not benefit from the protections that are afforded to consumers as such protections are designed to protect the innocent consumer and not a person committing an alleged fraud. Paragraph 14 was not drafted and included in the Adversary Complaint with the intent of intimidating Debtor or to remove the potential liability for fees and costs under 11 U.S.C. §523(d).

C. The Claim of Fraud in the Adversary Complaint Had Evidentiary Support.

Regarding Fed. R. Bankr. P. 9011(b)(3), the factual contentions in the complaint do have evidentiary support as it is undeniable that Debtor took out the loan on November 3, 2022, never made a single payment on the loan, and filed her bankruptcy petition a mere 138 days later. Also, Golden 1 and Counsel believe that, had discovery been conducted, more evidentiary support would have been discovered—which is specifically enumerated in section 9011(b)(3).[3]

---

[2] Additionally, upon review of Debtor's petition and schedules, Counsel noted that it was unusual for a person to file a bankruptcy petition when their monthly expenses are only about $20.00 more than their monthly income. Based on his experience, Counsel determined that to declare bankruptcy due to only a difference of $20.00 a month rather than adjust spending habits was another indicia of fraud. (See ¶20 of the Declaration of Karel Rocha).

[3] There were inconsistencies between the financial information the Debtor provided to Golden 1 in her loan application, and the information she provided in her Schedules with this Court. On Debtor's Application for the subject loan, she claimed to have a monthly income of $3,172.00 (Gross) and monthly liabilities of $930.00 and $450.00 for rent. (Miller Decl., ¶¶9-11 & Exhibit A.) In her Schedule I filed in the instant Chapter 7 proceeding, Debtor stated that she has a monthly income of $2,773.90 (Gross) and a take-home income of $2,487.46, and in Schedule J, Debtor stated

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

In *In re Akins*, the Court reasoned that including allegations based on information and belief can be allowed and cited to the below authorities:

> "As discussed in Moore's Federal Practice, Civil § 8.04, the use of "information and belief" is a pleading device for the use in a complaint (or motion) to allow a plaintiff (or movant) to fill in the gaps of alleging a claim pending discovery.
>
> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to set forth allegations that "will likely have evidentiary support after a reasonable *728 opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.
>
> Nothing in the *Twombly* plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of wrongdoing, or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss."

In re Akins, 640 B.R. 721, 727–28 (Bankr. E.D. Cal. 2022)

It is not unreasonable for a financial institution to infer that when a person takes out a loan, fails to make even one payment, then shortly thereafter initiates bankruptcy proceedings, said person did so with fraudulent intent to obtain funds knowing that they were not going to repay the loan. Plaintiff and Plaintiff's counsel reasonably used these facts in their respective inquiries as indicia of fraud and were then afforded the ability to allege said facts in the Complaint and base the additional facts related to the alleged fraud on information and belief.

---

that her monthly expenses were $2,498. (Rocha Decl., ¶¶16-19 & Exhibit D.) While Golden 1 did not expressly plead that Debtor's debt was nondischargeable under section 523(a)(2)(b) based on the submission of false financials—and instead pled a single cause of action for fraud based on the indicia of fraud described herein—Golden 1 did allege in the Complaint that Debtor made material misrepresentations concerning the debt. (Exhibit E, ¶10 at 2:20-21.)

When, as the case is here, the court initiates sanctions under Rule 9011, the conduct must be "akin to contempt" which requires "more than ignorance or negligence on the part of [the attorney]." *In re Nakhuda*, 544 B.R. 886, 902 (9th Cir. BAP 2016). The *Nakhuda* court went on to find that:

> "at bottom, the "akin to contempt" standard seems to require conduct that is particularly egregious and similar to conduct that would be sanctionable under the standards for contempt. See *MyMedicalRecords, Inc. v. Jardogs, LLC*, 2015 WL 5445987, at *2 (C.D.Cal. Sept. 16, 2015) (finding that bad faith analysis applied to court-initiated sanctions under Civil Rule 11); *Brown v. Royal Power Mgt., Inc*., 2012 WL 298315, at *4 (N.D.Cal. Feb. 1, 2012) (finding that assertion of a position knowing that it is baseless "constituted bad faith and lacked forthrightness with the court" and thus was "akin to contempt."); *Stone v. Wolff Properties LLC*, 135 Fed.Appx. 56, 60 (9th Cir.2005) (reversing district court's imposition of sua sponte sanctions, finding that appellant's "conduct, though perhaps not laudable, was not so 'egregious' as to be considered 'beyond the pale.' ") (citing R & D Latex Corp., 242 F.3d at 1116–18); *Sanai v. Sanai*, 408 Fed.Appx. 1, 2 (9th Cir.2010) (affirming sua sponte sanction award by district court which issued OSC, gave appellants an opportunity to be heard, and expressly found they acted in bad faith); Lynch v. Cal. Ct. of Appeal, Third Dist., 2008 WL 2811197, at *7 (July 14, 2008) (noting that prior to a sua sponte imposition of sanctions under Civil Rule 11, the court must find that counsel's conduct was particularly egregious, i.e., "akin to a contempt of court"); compare *Darulis v. Iaria*, 2008 WL 5101932, at *4 (S.D.Cal. Dec. 1, 2008) (finding conduct was not of the nature of a violation of a court order and therefore could not be punished sua sponte under Civil Rule 11)."

Id. at 901.

Based on the above, it is clear that Plaintiff and Plaintiff's counsel filed the complaint based on the indicia of fraud stated herein as well as on information and belief that Debtor committed fraud when she took out the loan with Plaintiff.

At the base of the present matter is the inquiry made by Plaintiff and Plaintiff's Counsel regarding the facts surrounding Debtor's loan and the decisions to file the Complaint in this matter. The Complaint does state facts and the necessary allegations related to the fraud cause of action. There are no misstated facts present in the Complaint nor has Plaintiff or Plaintiff's Counsel misled this Court nor have they pushed any unsupported legal or factual argument and the case has already been dismissed without litigation beyond the single status conference that was held.

/ / /

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

D. Sanctions Are Not Warranted.

Courts have a history of not sanctioning parties if a pleading did not include enough facts. (See *WSB Elec. Co., Inc. v. Rank & File Committee to Stop 2-Gate System*, N.D.Cal.1984, 103 F.R.D. 417, finding: The signature of an attorney on pleading constitutes certificate by him that there is factual basis for complaint and that complaint is warranted by law does not preclude counsel from advancing innovative claims and contentions to advance client's cause. Courts have also held that even where a pleading was not adequately pled, there was no basis for a Rule 11 sanction. (*Les Mutuelles du Mans Vie v. Life Assur. Co. of Pennsylvania*, N.D.Ill.1989, 128 F.R.D. 233.) See also: *Kovian v. Fulton County Nat. Bank and Trust Co*., N.D.N.Y.1994, 857 F.Supp. 1032 finding that: Party that predicates its legal claim on controversial and unsettled legal theory should not face sanctions under federal rules. *Mugworld, Inc. v. G.G. Marck & Associates, Inc*., E.D.Tex.2007, 563 F.Supp.2d 659, affirmed 351 Fed.Appx. 885, 2009 WL 3489843.)

Counsel for Plaintiff is a seasoned attorney with many years of practice representing creditors in bankruptcy matters. Plaintiff is a creditor to many debtors and the decisions to file or not to file an adversary complaint in each case is only made after careful consideration of the facts of the matter, the relevant law including both statutory and case law, and the ability to determine or discover any additional facts prior to filing an adversary complaint. Plaintiff and Plaintiff's Counsel only determine an adversary complaint is proper after inquiry into the matter and after it is determined that the facts indicate some matter of wrongdoing on behalf of a debtor and there is a sound basis in law to make such a claim. The vast majority of matters in which a bankruptcy petition has been filed, and Plaintiff and Plaintiff's Counsel are a creditor and an attorney respectively, do not result in the filing of an adversary complaint. Only the cases, such as the instant case, that have a basis and evidentiary support to make such a claim are adversary complaints actually filed.

11 U.S.C. §523(d) states:

> (d)If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

"To avoid a fee award, a creditor must show that it had a reasonable basis in law or fact to file an action, or otherwise demonstrate the existence of special circumstances." *In re Duplante*, 215 B.R. at 449, quoting *In re Carolan*, 204 B.R. 980, 987 (9th Cir. BAP 1996).

Section 523(d) was intended to discourage creditors from initiating meritless actions based on section 523(a)(2) in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. *In re Itule*, 114 B.R. 206, 213 (9th Cir. BAP 1990). However, this concern must be balanced against the risk that imposing the expense of the debtor's attorney's fees and costs on the creditor may chill creditor efforts to have debts that were procured through fraud declared nondischargeable. *In re Carolan,* 204 B.R. at 987. However, there is no presumption that the creditor was not substantially justified simply because it did not prevail. *Id. In re Stine*, 254 B.R. 244, 250 (B.A.P. 9th Cir. 2000*), aff'd*, 19 F. App'x 626 (9th Cir. 2001)

Here, the position of Plaintiff was more than substantially justified given the indicators of fraud discussed above, and Debtor's subsequent bankruptcy petition as well as the statements made in the Complaint both as facts as well as those stated on information and belief. Moreover, the case was voluntarily dismissed by Plaintiff and Debtor was not represented by counsel in the adversary case and therefore no attorney fees should be awarded.

V. CONCLUSION

Based on the above and the concurrently filed declarations it is clear that Golden 1 and Counsel reviewed the loan file and considered all the facts available prior to filing the Adversary Complaint. The Complaint was not filed for any improper purpose, it was not frivolous as it was a valid claim of fraud, and the allegations therein have evidentiary support. Accordingly, neither sanctions under Rule 9011 nor an award of attorney fees or costs would be appropriate.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889

Moreover, in light of the concerns expressed by the Court, Golden 1 has suspended new adversary filings pending an independent legal review of its pending adversary complaints. If warranted by the outcome of that review, Golden 1 may make adjustments to its policies, procedures, and litigation practices. (Linn Decl., ¶5.) Golden 1 is committed to ensuring that it complies with all debt collection laws and meets the highest standards of ethics in litigation.

DATED: August 17, 2023

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation

By: _____
KAREL ROCHA
Attorneys for THE GOLDEN 1 CREDIT UNION, a California corporation

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation
2122 NORTH BROADWAY, SUITE 200
SANTA ANA, CALIFORNIA 92706-2614
TEL (714) 547-2444 • FAX (714) 835-2889