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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re: KIRRA DENISE MOORE, Debtor. PALMER J. SWANSON, P.C., Plaintiff, v. KIRRA DENISE MOORE, Defendant.	Case No. 10-37374-D-7 Adv. Pro. No. 11-2022-D Docket Control Nos. DMR-7, DMR-8 Hearing: DATE: November 16, 2011 TIME: 10:00 a.m. DEPT: D Supplemental Briefing Concluded and Motion Submitted on December 8, 2011

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On September 30, 2011, the defendant in this adversary proceeding, Kirra Denise Moore ("Moore"), filed a Motion to Dismiss the Adversary Complaint and for Partial Summary Judgment on the Adversary Complaint, Docket Control No. DMR-7 (the "Motion").[1] [2] The Motion is brought on the ground that the

1. The use of "partial" in the title appears to be a misnomer, as the Motion seeks judgment on all the causes of action of the complaint.

2. Most of the moving papers bear either Docket Control No. DMR-7 or DMR-8; a few bear other docket control numbers. Moore's counsel has indicated the documents are intended to comprise a single motion, and the parties have treated them as such.

plaintiff, Palmer J. Swanson, P.C.,[3] lacks standing to pursue the complaint. The Motion was briefed and argued, and the court then allowed the parties to submit supplemental evidence and briefing. For the reasons discussed below, the court will deny both the request for dismissal and the request for summary judgment.

I. PRELIMINARY PROCEDURAL ISSUE

First, Swanson points out that the Motion was not timely filed under the court's scheduling order, which required dispositive motions to be heard by September 30, 2011. Here, the Motion was filed on September 30, 2011, and was not heard until November 16, 2011. Moore failed to request modification of the scheduling order to permit the late filing, which ordinarily would cause the court to deny the Motion.

However, the defense of lack of standing is a dispositive one. Moore has raised the issue repeatedly since the complaint was filed, and the court has addressed it in earlier rulings. Thus, Moore's present challenge to Swanson's standing does not come as a surprise to Swanson. Further, while the scheduling order provides that failure to schedule a Rule 12(b)(6)[4] motion by the dispositive motions bar date constitutes a waiver of the contention that the complaint fails to state a claim upon which relief can be granted, the order does not contain a similar

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3. "Swanson" as used herein will mean the plaintiff, Palmer J. Swanson, P.C. "Palmer Swanson" will mean the plaintiff's principal, Palmer J. Swanson.

4. All references to Rule 12(b)(6) are to Fed. R. Civ. P. 12(b)(6); all references to Rule 56 are to Fed. R. Civ. P. 56. Unless otherwise indicated, all other Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, and all Code, chapter, and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

provision with regard to summary judgment motions.

Moreover, under Fed. R. Civ. P. 56(f), incorporated herein by Fed. R. Bankr. P. 7056, the court may consider summary judgment on its own at any time, even absent a motion by a party. And a court has the power to reconsider and modify its interlocutory orders at any time prior to entry of final judgment, "for cause seen by it to be sufficient," under Fed. R. Civ. P. 54(b) (Rule 7054(a)). See City of L.A. v. Santa Monica BayKeeper, 254 F.3d 882, 885 (9th Cir. 2001). Here, judicial economy and the interests of avoiding delay and expense to the parties dictate that the issue be considered at this time, and the court will modify the scheduling order to permit it to consider the Motion. Swanson has opposed and argued the Motion on substantive grounds and the parties have made a factual record; the court has permitted the submission of additional evidence and briefing after the hearing, and no further argument or evidence is necessary.

II. ANALYSIS

This court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

A. Standards for Dismissal

By its complaint in this proceeding, Swanson seeks to deny Moore's discharge pursuant to § 727(a) or to dismiss her chapter 7 case pursuant to § 521(e)(2)(C) (for failure to supply a copy of her tax return to Swanson upon its request). In the complaint, Swanson alleges it is a creditor of Moore; the circumstances of the debt are not described.

Moore contends Swanson is not a creditor of hers, and as a result, has no standing to prosecute a complaint to deny her discharge or to dismiss her chapter 7 case. The Motion is brought under both Rule 12(b)(6) and Rule 56. A Rule 12(b)(6) motion focuses, with limited exceptions, only on the pleadings. See Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008).

So far as standing is concerned, "[t]o survive a Rule 12(b)(6) motion to dismiss, [a plaintiff] must allege facts in his [complaint] that, if proven, would confer standing upon him." Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9th Cir. 2006), citing Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir. 2003). In this case, accepting as true the allegation in the complaint that Swanson is a creditor of Moore, the court concludes that the complaint sufficiently pleads standing, and to the extent the Motion seeks dismissal under Rule 12(b)(6), it will be denied.

B. Standards for Summary Judgment

In considering a summary judgment motion, on the other hand, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Rule 56(c)(1). "The court need consider only the cited materials, but it may consider other materials in the record." Rule 56(c)(3). The moving party bears

the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

C. Standing to Object to a Bankruptcy Discharge

"Standing to object to a discharge is limited to the trustee, a creditor, or the United States trustee under § 727(a). See § 727(c)(1). Only those creditors who have claims that will be affected by the discharge can file objections to the discharge." McCleskey v. Stockton (In re Stockton), 2005 Bankr. LEXIS 3375, *30 (9th Cir. BAP 2005), citing In re Vahlsing, 829 F.2d 565, 567 (5th Cir. 1987). True, a creditor whose claim is disputed by the debtor may object to discharge. See Vahlsing, 829 F.2d at 567 ["A discharge would affect the interests of creditors with disputed claims since they have a chance of prevailing on their claims."].

However, once a creditor's claim has been disallowed, he or she no longer has standing to object to discharge. Stockton, 2005 Bankr. LEXIS 3375, at *31, citing Vahlsing, 829 F.2d at 567. This is because "a discharge will not even potentially affect" the interests of a person or entity not holding a claim against the debtor. Vahlsing, 829 F.2d at 567. Thus, a plaintiff's status as a creditor is appropriate for determination on a motion to dismiss, see In re Beugen, 99 B.R. 961, 962-65 (9th Cir. BAP 1989), or, as here, a motion for summary judgment. See CBS, Inc.

v. Folks (In re Folks), 211 B.R. 378, 383-84 (9th Cir. BAP 1997).

D. Swanson's Standing

1. Factual Background

Palmer Swanson, the plaintiff's principal, is an attorney who claims Moore owes his firm approximately $32,394.51 plus interest for unpaid legal services and costs. That figure is listed in a letter Palmer Swanson sent to Moore on February 25, 2008 as the amount due for services performed in a probate case concerning the estate of Margaret Curtis (the "probate case"). Curtis was the aunt of Steve Leus, who is and at the time the legal services were performed was Moore's boyfriend and co-habitant. There has been no allegation that Moore owes Swanson for services rendered in any other matter. The fees in question were billed by Swanson on an hourly basis; they are not based on a contingency fee.

2. California Business & Professions Code § 6148

Cal. Bus. & Prof. Code § 6148(a) provides that "[i]n any [non-contingency fee] case . . . in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing." The written contract shall contain the basis of compensation, "[t]he general nature of the legal services to be provided to the client," and the respective responsibilities of the attorney and the client. Id. Failure to comply with these requirements "renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." § 6148(c).

Palmer Swanson testified at his deposition that he is not aware of any written contracts executed between him and Moore for the provision of legal services except an Attorney and Client Engagement Agreement signed by Moore and Palmer Swanson in January 2006 (the "Agreement"). The Agreement states that Swanson will represent Moore with respect to "an action for damages for conversion of furniture."[5] (At the time the Agreement was signed, Moore had a business called Encore! Builders Clearing House, which was in the business of selling furniture that had been in model homes.) The Agreement does not state that it may be extended to cover any services or types of services other than the original action for damages for conversion of furniture. Thus, Swanson does not dispute that Moore and Swanson did not have a written agreement explicitly covering the legal services provided by Swanson in the probate case. Palmer Swanson has testified that at the time he began rendering services in the probate case, he did foresee that the amount of legal fees would be more than $1,000.

When asked why he did not execute a written retainer agreement regarding the probate case, Palmer Swanson replied that the matter was within the scope of Cal. Bus. & Prof. Code § 6148(d)(2). That subsection provides that the requirement of a written agreement shall not apply to "[a]n arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the

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5. Exhibits 1 Through 7 to Supplemental Declaration of Palmer J. Swanson in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment, filed November 28, 2011 ("Supp. Exhibits"), Ex. 1, p. 6, ¶1.

client." In this regard, Palmer Swanson testified that after the original matter -- the furniture conversion matter, Swanson handled other business matters for Moore -- "disputes with people over storage of furniture, disputes over performance of contracts involving furniture and staging," a nuisance complaint against Moore involving a dog, and a couple of other nonbusiness matters he could not recall the nature of. He characterized the probate case as "the latest in a long line of those," and concluded that it fell with the scope of § 6148(d)(2).[6]

The court disagrees for at least two reasons. First, services in a probate case are not "of the same general kind" as those involving disputes over furniture contracts or other business matters. Second, the services previously rendered by Swanson to Moore and paid for by Moore were services for Moore, whereas the services Swanson performed in the probate case were services primarily for a third party -- Leus.[7] For both these

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6. Palmer Swanson testified that when Moore would request services on a new matter, "[he] would say, okay, we'll do that, and we'll do it under the same terms as we have in our prior agreement [the Agreement]. And I would generally then write her a letter stating, I'm undertaking your representation in this new matter, and away I go." Notice of Lodging Deposition Transcript of Palmer J. Swanson, Taken August 30, [2011], Changes and Exhibits 1-24 Thereto, in Support of Debtor[']s Motion for Summary Judgment Under Local Rule 7056-1(a), filed October 27, 2011 ("Swanson Dep."), at 48.

Swanson has not suggested that he wrote to Moore confirming his representation in the probate case, and has not submitted a copy of any such letter.

7. Swanson contends its services in the probate case were provided for Moore and Leus jointly, and that it had previously represented both of them jointly in "at least one or more matters other than the Probate Matter." Declaration of Palmer J. Swanson in Support of Plaintiff's Supplemental Opposition to Defendant's Motion for Summary Judgment, filed November 28, 2011 ("Supp. Decl."), ¶ 9. The only example Swanson gives is a letter Palmer

reasons, Swanson's services in the probate case did not fall within the "same general kind" exception to the requirement of a written fee agreement.

3. The State Court's Order Compelling Arbitration

Prior to the filing of Moore's bankruptcy petition, Swanson sought and obtained an order of the Sacramento County Superior Court compelling Moore to arbitrate her dispute with Swanson over the fees for the probate case (the "Arbitration Order").[8] Swanson contends the Arbitration Order has binding effect and precludes Moore from disputing in this court either (1) that the Agreement was valid and enforceable or (2) that the fees for the probate case were covered by the Agreement, such that Moore's Bus. & Prof. Code § 6148(a) argument fails. This theory -- that a court ordering parties to arbitration necessarily and conclusively decides issues about the validity and scope of the underlying contract -- would extend the effect of an order compelling arbitration far beyond existing law governing arbitration, claim preclusion, and issue preclusion.

Swanson wrote to the County of Sacramento addressing a neighbor's complaint about barking dogs on Moore's and Leus' property. Assuming but not deciding that Swanson's services in that matter were of the "same general kind" as earlier services provided to and paid for by Moore, legal services in a probate case in which Leus, and not Moore, was a beneficiary, did not.

8. Swanson finds it significant that Moore did not oppose the petition to compel arbitration. Moore states she was not permitted to present opposition because she was not represented by counsel, and thus, was not aware she had to notify the court prior to the hearing of her objection to its tentative ruling. As discussed below, the court finds that Moore's objections to the enforceability and applicability of the Agreement, as affecting the fees for the probate case, would not have been addressed by the court in any event, but would have been referred to arbitration. Thus, Moore waived nothing by not presenting her arguments at that time.

In considering whether to give preclusive effect to a state court's judgment, the bankruptcy court looks to that state's law on preclusion. Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002). Under California law, "[r]es judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 896 (2002). For purposes of claim preclusion, a "cause of action" is based on the plaintiff's "primary right;" namely, "the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory . . . advanced." Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 798 (2010). "'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.'" Id., quoting Slater v. Blackwood, 15 Cal. 3d 791, 795 (1975), emphasis in original.

For collateral estoppel, or issue preclusion, to apply, the issue raised in the later proceeding must be identical to an issue actually litigated and necessarily decided in the earlier proceeding. Lucido v. Superior Court, 51 Cal. 3d 335, 341-43 (1990). For application of either claim preclusion or issue preclusion, the decision in the earlier proceeding must have been final and on the merits. Boeken, 48 Cal. 4th at 797.

By contrast, based on California law on arbitration, the court concludes that the Arbitration Order is not final, binding, "on the merits," or of any preclusive effect on any of the issues in the underlying dispute; that is, the dispute the parties were

ordered to arbitrate.[9] Claim preclusion does not apply because the "primary right" vindicated by an order compelling arbitration is the petitioner's right to arbitration, not his or her rights in the underlying dispute. Issue preclusion does not apply because the issue Moore now raises -- Swanson's right to collect fees for the probate case from Moore -- was not actually litigated or necessarily decided by the state court in the Arbitration Order.

The Arbitration Order states that the court "confirms its tentative ruling," which, in turn, reads in its entirety:

> Petition to Compel Arbitration of Fee Dispute and for appointment of arbitrator is unopposed and is granted. Arbitration to take place within 90 days of the date of this order.
>
> Petitioner [Swanson] requests that the Court appoint either Thomas Trost or Eugene Haydu as arbitrator. Petitioner is directed to attempt to meet and confer with respondent, and if there is no response the Court appoints Thomas Trost as arbitrator.
>
> County Bar notice of right to arbitrate pursuant to B&P Code 6200-6206 only concerns Probate matter, seeking $32,011.05. Therefore the binding arbitration only concerns this amount.
>
> The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.[10]

Thus, the Arbitration Order itself says nothing about the validity or enforceability of the Agreement, about whether the

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9. Although an arbitration award, whether confirmed by a subsequent judgment or unconfirmed, may have preclusive effect, Thibodeau v. Crum, 4 Cal. App. 4th 749, 758-61 (1992), "the essential adjudication in an arbitration proceeding is the award." Id. at 760, quoting Trollope v. Jeffries, 55 Cal. App. 3d 816, 824 (1976). In this case, there was no award, only an order compelling Moore to arbitrate.

10. Supp. Exhibits, Ex. 2.

Agreement was extended by the parties to cover the probate case, or about whether Swanson's services in the probate case fell within the "same general kind" exception to the requirement of a written fee agreement for services expected to cost more than $1,000.[11] [12] Swanson's statement that the Superior Court made a specific finding that the probate matter was within the scope of the Agreement is inaccurate.

Petitions to compel arbitration are governed by Cal. Code Civ. Proc. §§ 1281 and 1281.2. "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Code Civ. Proc. § 1281.

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

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11. Nor does Swanson's Petition to Compel Arbitration of Fee Dispute. The closest it comes is this: "This agreement [the Agreement] was extended to cover numerous matters of a period of many months." Supp. Exhibits, Ex. 1. The petition does not mention § 6148(d)(2) or the theory, apparently raised for the first time in this adversary proceeding, that the services in the probate case were of the same general kind as services earlier provided to and paid for by Moore.

12. "The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect." Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), citations omitted, emphasis added.

> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.

Cal. Code Civ. Proc. § 1281.2.

Swanson contends the fees for the probate case must fall within the scope of the Agreement because the Superior Court found that the "controversy" over those fees fell within the scope of the Agreement. This argument is controverted by the definition of a controversy, for purposes of the arbitration statutes. "'Controversy' means any question arising between parties to an agreement whether such question is one of law or of fact or both." Cal. Code Civ. Proc. § 1280(c), emphasis added. The parties' controversy over the fees for the probate case falls within that definition; this does not mean, however, that the fees are covered by the Agreement, such that Moore is liable for them. Instead, that is precisely the question "arising between the parties" to the Agreement.

In this regard,

> [i]f the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

Cal. Code Civ. Proc. § 1281.2, emphasis added.

> In ruling upon a petition to compel arbitration, the superior court is allowed to determine arbitrability issues, such [as] the existence and validity of the arbitration agreement, by utilizing summary motion procedures. (Rosenthal [v. Great Western Fin. Securities Corp.], 14 Cal.4th 394, 409 [1996].) These procedures are consistent with the use of private arbitration as a means of resolving disputes quickly and inexpensively. (Ibid.) "[T]he superior court does not decide whether the plaintiff's causes of action have merit, although some factual questions considered

> in deciding the application may overlap those raised by the plaintiff's claims for relief. The only question implicated by the petition to compel arbitration is whether the arbitration agreements should be specifically enforced. . . . [T]he superior court decides only the facts necessary to determine specific enforceability of an arbitration agreement, an equitable question as to which no jury trial right exists. (Id. at p. 412.)

Duffens v. Valenti, 161 Cal. App. 4th 434, 444 (2008), emphasis added.

In reviewing a petition to compel arbitration, the court considers only the existence and validity of the agreement to arbitrate, not the validity or enforceability of the rest of the parties' agreement. In other words, "'except where the parties otherwise intend -- arbitration clauses . . . are "separable" from the contracts in which they are embedded . . . .'" Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal. 3d 312, 319 (1983), quoting Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 402 (1967) [construing federal arbitration law]. As a result, "even claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration," Ericksen, 35 Cal. 3d at 323, and the court is to grant a motion to compel arbitration even in the face of a party's contention that the underlying agreement was procured through fraud. Id. at 324.

"[U]nless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator." Moncharsh v. Heily & Blase, 3

Cal. 4th 1, 31 (1992), emphasis added. See also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006) ["unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."].

> [T]he only appropriate issues of fact which may be raised [on a motion to compel arbitration] are (1) whether "a written provision for arbitration was made" and (2) whether "there is a default in proceeding thereunder." Thus the word "default" . . . refers only to the "default" of a party in refusing to proceed to arbitration as agreed rather than to a default by a party under the main provisions of the parties' contract. . . . Any other interpretation of [the arbitration statutes] would defeat the main purpose of arbitration proceedings, which is to obtain an expeditious hearing and determination by arbitrators of any "disagreement" which may arise.

Weiman v. Superior Court of San Francisco, 51 Cal. 2d 710, 712-13 (1959), emphasis added.

For the same reasons, the court finds that in response to Swanson's motion to compel arbitration, Moore would not have been able to raise, and is not bound by her failure to raise, the issues of the validity and enforceability of the Agreement (except the portion constituting the agreement to arbitrate disputes) or its applicability to the fees for the probate case.

In St. Agnes Medical Center v. PacifiCare of California, 31 Cal. 4th 1187 (2003), PacifiCare and St. Agnes Medical Center were parties to two health services contracts, one entered into in 1994 and the other in 2000. The 2000 agreement contained an arbitration clause; the 1994 agreement did not. PacifiCare began the legal contest between the parties by filing a lawsuit in state court in which it alleged that the 2000 agreement was void ab initio due to a condition subsequent, and sought to enforce

its rights under the 1994 agreement "as if the [2000 agreement] never existed." 31 Cal. 4th at 1192. St. Agnes responded by filing a state court action seeking damages for breach of the 2000 agreement, and in response to that complaint, PacifiCare sought to compel arbitration under the arbitration clause in the 2000 agreement.

The court held that PacifiCare had not waived its right to compel arbitration even though it was simultaneously seeking rescission of the 2000 agreement as a whole. St. Agnes, 31 Cal. 4th at 1200. There was no indication the court viewed PacifiCare's motion to compel arbitration as precluding it from continuing to challenge the validity or enforceability of the 2000 agreement -- the very agreement that contained the arbitration clause.

Similarly, neither the Arbitration Order nor Moore's failure to challenge the petition for arbitration precludes her from challenging the validity, enforceability, or applicability of the Agreement to the fees for the probate case. Those issues were simply not decided by the state court when it issued the Arbitration Order. The only issue actually litigated and necessarily decided was that there was an enforceable agreement to arbitrate.

To summarize, issue preclusion does not apply to the Arbitration Order because the issues to which Swanson seeks to apply it were not actually litigated or necessarily decided. Claim preclusion does not apply because, although it bars litigation of issues that could have been litigated, as well as those that actually were litigated in the earlier proceeding,

Zevnik v. Superior Court, 159 Cal. App. 4th 76, 82 (2008), in this case, the only issue that could have been litigated on the petition to compel arbitration was whether there was an agreement to arbitrate disputes between Moore and Swanson. Had Moore raised the issues of enforceability of the Agreement and its applicability to the probate fees, the court would not have decided them; it would have referred them to the arbitrator. Finally, neither issue preclusion nor claim preclusion applies because the Arbitration Order was not a final ruling on the merits of the issues presented in the underlying dispute.[13]

4. Remaining Arguments re Lack of Written Agreement

Swanson raises several other arguments to support its theory that Moore is liable for the fees even if the court concludes there was no written agreement covering them. Palmer Swanson testified that Moore had told him "they" (Moore and Leus) were

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13. Swanson also relies on the Full Faith and Credit Statute, 28 U.S.C. § 1738, under which a federal court must give the same effect, including preclusive effect, to a state court judgment as would the courts of the state in which the judgment was entered. Swanson concludes, "This court is, therefore, bound to give preclusive effect to [the Arbitration] Order, just as the Superior Court would." Plaintiff's Supplemental Opposition to Defendant's Motion for Summary Judgment, filed November 28, 2011, 8:8-9.

However, Swanson offers no basis on which to conclude the Superior Court would give the Arbitration Order preclusive effect on any of the issues in the underlying dispute. A judgment confirming an arbitration award has the same force and effect and may be enforced like any other judgment of the court that issues it. Cal. Code Civ. Proc. § 1287.4. And an unconfirmed award, although it has only the status of a written contract between the parties, Cal. Code Civ. Proc. § 1287.6, may also be entitled to preclusive effect. See n.9, above. But there is no authority for the proposition that a California court would give an order compelling arbitration preclusive effect on the issues in the underlying dispute -- the dispute that was being sent to arbitration.

unhappy with "their" attorney in the probate case, that "they" might want to engage Swanson to assist "them," and that Moore later asked Swanson to represent her and Leus, who Palmer Swanson understood at the time was Moore's husband. In addition, Swanson contends (1) Swanson issued bills for services in the probate case to both Moore and Leus, and Moore did not object; (2) Moore wrote at least a couple of checks in payment of Swanson's fees for the probate case; (3) Moore used the term "we" in e-mail and other written communications in which she said she and Leus were going to pay Swanson's bills; (4) Moore "called all the shots during the [probate] litigation" (Swanson Dep. at 20), with little input from Leus; and (5) Moore listed Swanson as a creditor in her bankruptcy schedules, without checking the "contingent," "unliquidated," or "disputed" box.

Assuming without deciding that these assertions are true, none of them overcomes the requirement of either a written "contract for services" under § 6148(a) or an implied agreement to cover services of the "same general kind" as previously rendered and paid for, under § 6148(d)(2), neither of which existed here. Although Palmer Swanson testifies to an e-mail in which he says Moore "states her agreement to pay for services rendered in regard to the Probate Matter" (Supp. Decl., § 10), the e-mail does not qualify as a written "contract for services," as required by § 6148(a). In the e-mail, Moore states, "Early Monday I am going to write your check that was not written Friday. It is the one payment for the estate for around $5,000.00. We will be sure to get the other monies owed to you

as soon as possible." Supp. Exhibits, Ex. 5.[14]

Moore's e-mail does not qualify as a written contract for services under § 6148(a) because it was not signed by both the attorney and the client, it does not state the basis of compensation, including rates and charges applicable to the case, and it does not state the general nature of the legal services to be provided or the respective responsibilities of the attorney and the client, all as required by that statute. In Iverson, Yoakum, Papiano & Hatch v. Berwald, 76 Cal. App. 4th 990 (1999), the plaintiff/law firm relied on a written promissory note signed by the client/defendant, in the amount of the attorney's fees alleged to be due, as a substitute for a written fee agreement required under § 6148(a). The court disagreed.

> The problem with this theory is that there is no evidence of any antecedent written fee agreement satisfying the provisions of section 6148, thus rendering any fee agreement voidable by the client; because there is no valid underlying contract for fees, the promissory note, which also fails to comply with section 6148, must also be voidable. If the instant promissory note were not also voidable under section 6148, the provisions of section 6148 would be able to be easily circumvented.

76 Cal. App. 4th at 996. The same reasoning and conclusion apply with respect to Moore's e-mail to Palmer Swanson, and to her listing of Swanson as a creditor in her bankruptcy schedules.[15]

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14. It appears from an accounting by Swanson, offered as an exhibit by Moore, that the payment referred to here was in fact for services in the probate case.

15. Further, Swanson does not contend it relied to its detriment on Moore's listing of Swanson as undisputed in her original schedules or that Swanson was prejudiced by Moore's amendment to list it as disputed. See Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 431 (9th Cir. BAP 2005).

For the reasons discussed above, the court concludes that the services in the probate case were not covered by a written fee agreement, as required by Cal. Bus. & Prof. Code § 6148(a), and did not fall within the "same general kind" exception of § 6148(d)(2). The Arbitration Order does not change either of these conclusions; nor do Swanson's remaining arguments.

Thus, Swanson was limited to recovery of "a reasonable fee," Bus. & Prof. Code § 6148(c); in other words, to fees on a quantum meruit basis.

5. The Statute of Limitations

"[A} statute of limitations does not begin to run until the cause of action accrues." Spear v. California State Auto. Assn., 2 Cal. 4th 1035, 1040 (1992). The date of accrual on Swanson's quantum meruit claim for fees in the probate case is either the last date Swanson performed services in the case, January 16, 2008 (see, E.O.C. Ord, Inc. v. Kovakovich, 200 Cal. App. 3d 1194, 1203 (1988)) or the date the last payment was made toward its fees, October 7, 2007 (see Iverson, 76 Cal. App. 4th at 996). The court need not determine which of these dates is correct, as the outcome of the Motion is the same either way.

The statute of limitations on a quantum meruit claim is two years. Cal. Code Civ. Proc. § 339; Iverson, 76 Cal. App. 4th at 996. Depending on whether the claim accrued on October 7, 2007 or January 16, 2008, the statute of limitations on Swanson's quantum meruit claim, unless otherwise tolled or satisfied, expired on October 7, 2009 at the earliest or on January 16, 2010 at the latest. On January 26, 2009, Swanson filed its petition to compel arbitration.

Thus, Swanson filed the petition before the statute of limitations on the underlying quantum meruit claim had run. The petition was also timely under the statute of limitations on an action to compel arbitration, which is four years after the time the other party has refused to submit to arbitration. Spear, 2 Cal. 4th at 1040-42; Meyer v. Carnow, 185 Cal. App. 3d 169, 173 (1986).[16] Thus, Swanson was entitled to a determination by way of binding arbitration as to the matter of its fees for the probate case.[17]

The Arbitration Order states that the arbitration was to take place within 90 days from the date of the order; Swanson apparently did not pursue arbitration within that time or in the 15 months before Moore filed her bankruptcy petition. However, the record in this case is not sufficient to establish that by this delay, Swanson waived or abandoned its right to arbitration. "Generally, the determination of waiver [of the right to arbitration] is a question of fact," see St. Agnes, 31 Cal. 4th at 1196, involving a consideration of several factors. Id.

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16. The court rejects Moore's contention that the statute of limitations began to run as early as January 2006, when the parties signed the Agreement, or June 2006, when Swanson's services in the furniture conversion matter referred to in the Agreement were allegedly completed. Under either theory, the cause of action would accrue, and the limitations period would begin, before the services for which the attorney's fees are sought have even been performed.

17. Moore argues the court should not consider the Arbitration Order because it was (1) not produced until the day of the hearing on the Motion, (2) not produced in response to applicable discovery requests, and (3) not listed in Swanson's pretrial statement. However, it is not the Arbitration Order that is the operative document for purposes of the statute of limitations issue, but the petition to compel arbitration, which Swanson had earlier produced and which Moore herself filed as an exhibit in support of the Motion.

Moore makes a strenuous waiver argument, but it is directed to Swanson's failure to produce the Arbitration Order earlier in this adversary proceeding, rather than to the pre-petition failure to pursue arbitration after obtaining the Arbitration Order. Moore also complains of Swanson's activities in this adversary proceeding, including engaging in discovery and filing various motions. She cites Christensen v. Dewor Developments, 33 Cal. 3d 778, 780-84 (1983), in which the court held that the plaintiffs, "by filing two complaints aimed at discovering their opponents' legal theories and thereby precipitating lengthy delays, [had] waived their right to arbitrate." 33 Cal. 3d at 787.

The reasoning and the case do not apply here. In Christensen, the plaintiffs chose to file and litigate an extensive civil complaint rather than proceeding with arbitration. There was no bankruptcy case involved. In the present case, Swanson sought to compel arbitration after Moore had not responded to its notice of right to arbitrate. Apparently, neither party took any action in the intervening 15 months prior to Moore's filing of her bankruptcy petition. At that point, however, (1) the automatic stay prevented Swanson from pursuing the arbitration, (2) Swanson was arguably a creditor, within the Code's broad definition, with the right to challenge Moore's discharge, and (3) having chosen that option, Swanson had the right to engage in discovery and litigation in the adversary proceeding.

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6. Right to Quantum Meruit Relief

Finally, Moore contends Swanson's services in the probate case were intended to and did benefit Leus, not Moore, and thus, that Swanson is not entitled to recovery on a quantum meruit basis as against Moore. The court was initially inclined to agree that there was no genuine issue of material fact on this issue, and it still appears the interests at stake in the probate case were largely Leus' interests, not Moore's. Leus and his two brothers were the sole beneficiaries of Curtis' will; they were the only individuals who stood to share in the estate after payment of creditor claims and attorney's fees. There is some debate as to whether Moore held herself out as married to Leus; however, as assets acquired by inheritance are separate property, even if Moore and Leus were married or if Palmer Swanson believed they were married, only Leus stood to benefit from the probate estate.

Swanson contends that as a result of its services, the Curtis estate administrator did not pursue Moore on account of an alleged fraudulent transfer by which the estate had sold a residence to Moore's mother -- the house in which Moore and Leus lived. It appears Swanson's services with respect to this issue were nominal and incidental to the rest of its services in the probate case, and there are hardly any time entries in Swanson's billings that concern the matter.

On the other hand, there is a genuine issue of material fact as to whether some of Swanson's services in the probate case, however small the portion, resulted in some benefit to Moore. Further, under California law, a party need not have received a

direct benefit in order to be obligated under quantum meruit for services provided to another. In Earhart v. William Low Co., 25 Cal. 3d 503 (1979), the issue was "whether a party who expends funds and performs services at the request of another, under the reasonable belief that the requesting party will compensate him for such services, may recover in quantum meruit although the expenditures and services do not directly benefit property owned by the requesting party." 25 Cal. 3d at 505. The court concluded that he may, id. at 515, stressing that "performance of services at another's behest may itself constitute 'benefit' such that an obligation to make restitution may arise." Id. at 511.

Moore has testified as follows on the issue of whether she asked Swanson to perform services in the probate case:

> I did not request that Swanson provide services for Leus. I did not offer to pay for any legal services rendered to Steven Leus. I specifically told Swanson I would not be responsible in any way for Steven Leus[']s fees. I have never agreed to be responsible for the legal fees of Steven Leus on any basis.[18]

Swanson, on the other hand, testifies that it was Moore who came to him in the first place and requested he provide representation in the probate case. Thus, there is a triable issue of material fact as to whether Swanson's services in the probate case were rendered at Moore's request, and thus, whether she is liable to Swanson on a quantum meruit basis for some or all of those fees, whether or not she benefitted directly from those services. As a result, the court concludes that, had the matter been arbitrated,

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18. Declaration [of Kirra Moore] in Support of Debtor[']s Motion for Summary Judgment, filed September 30, 2011, ¶¶ 4, 5, 7, 8.

it is possible the arbitrator would have found Swanson entitled to fees from Moore on a quantum meruit basis, even if in a small amount. In these circumstances, for the purposes of summary judgment, and given the broad definition of a "claim" under the Bankruptcy Code, Egebjerg v. Anderson (In re Egebjerg), 574 F.3d 1045, 1049 (2009), the court finds there are genuine issues of material fact as to Swanson's standing in this adversary proceeding. For that reason, the Motion will be denied.

III. CONCLUSION

For the reasons discussed above, the court concludes that Swanson's complaint sufficiently pleads Swanson's standing as a creditor of Moore, and further, that as a result of the presence of genuine issues of material fact, Moore is not entitled to judgment as a matter of law on the issue of Swanson's standing. Thus, Moore's requests for dismissal of the complaint and for summary judgment will be denied.

The court will issue an appropriate order.

Dated: January 3, 2012

_____/s/_____
ROBERT S. BARDWIL
United States Bankruptcy Judge