UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

August 24, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	13-33804-D-7 BHS-4	RHONDA STIJAKOVICH-SANTILLI	CONTINUED MOTION FOR COMPENSATION FOR BARRY H. SPITZER, TRUSTEE'S ATTORNEY 6-13-16 [153]
2.	16-23707-D-7 KAZ-1 THE BANK OF NEW YORK MELLON VS.	JAMES/DEBORAH RAY	MOTION FOR RELIEF FROM AUTOMATIC STAY 7-14-16 [17]

3. 16-20916-D-7 DENISE CORDOVA — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
7-25-16 [23]

4. 14-25820-D-11 INTERNATIONAL MANUFACTURING GROUP, INC.
16-2082 MCFARLAND V. BATTLE CREEK STATE BANK ET AL
[MBL-1] — CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
6-1-16 [7]

This matter will not be called before 10:30 a.m.

Tentative ruling:

This is the motion of defendant Battle Creek State Bank ("Battle Creek") to dismiss the complaint of the plaintiff, Beverly McFarland, who is also the trustee in the chapter 11 case in which this adversary proceeding is pending (the "trustee"), pursuant to Fed. R. Civ. P. 12(b)(2) and (6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b), for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. The trustee has filed opposition and Battle Creek has filed a reply. For the following reasons, the motion will be conditionally granted for lack of personal jurisdiction and denied as to the Rule 12(b)(6) issue.

Personal Jurisdiction

Battle Creek contends this court lacks personal jurisdiction over it because (1) Battle Creek lacks the minimum contacts with the State of California to establish general personal jurisdiction in this court; and (2) the trustee's particular claims against Battle Creek do not meet the applicable standards for the establishment of specific jurisdiction over Battle Creek. The trustee counters both points, contending (1) Battle Creek has engaged in sufficient business contacts with the State of California or its residents to establish general jurisdiction; and (2) even if it has not, Battle Creek has purposefully availed itself of the privilege of conducting activities in California, the trustee's claims arise out of Battle Creek's California-related activities, and the exercise of jurisdiction comports with fair play and substantial justice. Thus, in the trustee's view, this court has specific personal jurisdiction of Battle Creek in this adversary proceeding.

The court has considered the parties' briefs on those issues but believes a ruling on them may be unnecessary. The court believes the applicable jurisdictional analysis for bankruptcy adversary proceedings is something different from those tests. Federal Rule of Bankruptcy Procedure 7004(f) governs personal jurisdiction

in such proceedings. The rule provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f). Subdivision (d) of the same rule, in turn, provides for nationwide service of process. See Fed. R. Bankr. P. 7004(d).

The Ninth Circuit explained the rule, which had just been amended to expand the bankruptcy court's jurisdiction over nonresidents, in Goodson v. Rowland (In re Pintlar Corp.), 133 F.3d 1141 (9th Cir. 1997).

> [U]nder the new rule, personal jurisdiction may be obtained in proceedings under the Bankruptcy Code over nonresidents who are served in conformity with Rule 7004(a) or the applicable subdivisions of Fed. R. Civ. P. 4 ("Civil Rule 4") so long as the exercise of jurisdiction is consistent with the Constitution. See Fed. R. Bankr. P. 7004(f) and advisory committee notes (1996 Amendments) ("Service or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant.").

133 F.3d at 1144. Thus, in that case, the court held that the defendants, who were foreign citizens residing outside the United States, had, by their activities in Texas and New York, sufficiently "interjected [themselves] into the United States" to subject themselves to the jurisdiction of the bankruptcy court for the District of Idaho (id. at 1147), and that court's "exercise of jurisdiction [was] consistent with the Constitution and the laws of the United States" (id. at 1146), as required by Rule 7004(f).

Similarly, in Jones-Theophilious v. Avery (In re Jones), 2015 Bankr. LEXIS 1170 (9th Cir. BAP 2015), the Bankruptcy Appellate Panel affirmed a ruling by the bankruptcy court for the Central District of California that it had jurisdiction over the defendant, who was incarcerated in Puerto Rico, under Rule 7004(f). 2015 Bankr. LEXIS 1170 at *17-18 ("Recognizing the reality that many interested parties in a bankruptcy case may not be local, bankruptcy court jurisdiction extends nationwide."). The notion of personal jurisdiction based on minimum national contacts, as opposed to minimum state contacts, derives from the notion of nationwide service of process. Thus, "[w]here a federal statute such as [the Securities Exchange Act] confers nationwide service of process, the question becomes whether the party has sufficient contacts with the United States, not any particular state." Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985).[1] The same applies in bankruptcy adversary proceedings by virtue of the bankruptcy rules providing for nationwide service of process, Rule 7004(d), and for personal jurisdiction, Rule 7004(f). Gonzales v. Miller (In re Tex. Reds, Inc.), 2010 Bankr. LEXIS 1417, *2-3 (Bankr. D. N.M. 2010). "[T]he nationwide service of process authorized by Fed.R.Bankr.P. 7004(d) extends personal jurisdiction over any person who has sufficient minimum contacts with the United States." Id. at *13.

On a challenge by the defendant, the plaintiff must satisfy three requirements. The plaintiff must show that "(1) service of process has been made in accordance with Rule 7004 of the Federal Rules of Bankruptcy Procedure or Fed.R.Civ.P. 4; (2) the action is 'a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code'; and (3) 'exercise of jurisdiction is consistent with the Constitution and the laws of the United States.'" Tex. Reds, Inc., 2010 Bankr. LEXIS 1417 at *8 (citation omitted). As to the third of these, courts generally find that "personal jurisdiction under Fed. R. Bankr. P. 7004(f) meets constitutional concerns based on the defendant's contacts with the United States, rather than the state where the bankruptcy court is located . . . ." Id. at *15-16. The matter of Battle Creek's contacts with the United States is not in question here. As to the second test, Battle Creek has not raised a challenge to this court's subject matter jurisdiction.

As to the first test, however, there is a problem. According to the proof of service of the summons and complaint, DN 6, the trustee served Battle Creek to the attention of Roger L. Brestel, who is its president. However, service was made by first-class mail whereas service on an FDIC-insured institution, such as Battle Creek, which had at that time not appeared in the action through an attorney, is required to be made by certified mail. Fed. R. Bankr. P. 7004(h). It is arguable Battle Creek, by its motion to withdraw the reference of this proceeding, consented to jurisdiction in this district. However, in the absence of effective service of process under Rule 7004 and absent a clear demonstration of waiver, the court cannot conclude at this point it has acquired personal jurisdiction of Battle Creek. See Keys v. 701 Mariposa Project, LLC (In re 701 Mariposa Project, LLC), 514 B.R. 10, 16 (9th Cir. BAP 2014) ("[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of [process] must be satisfied.").

The court intends to conditionally grant Battle Creek's motion and dismiss the complaint for lack of personal jurisdiction, but will allow the trustee a short time to effect service of process or demonstrate that Battle Creek has waived jurisdictional objections. If the trustee successfully takes one of these steps, the court will then afford Battle Creek an opportunity to brief the issue of personal jurisdiction in light of Rule 7004(f) and the trustee will have an opportunity to reply. Both parties will be limited to a brief of four pages in length.

The Rule 12(b)(6) Issue

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). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The trustee alleges Battle Creek made a loan to an individual named Larry Carter to enable him to purchase an aircraft to be owned by N9FX LLC ("N9FX"), a limited liability company of which Carter was a managing member; that the loan was secured by the aircraft; and that the debtor in the underlying chapter 11 case, International Manufacturing Group, Inc. ("IMG") made the monthly payments on the

loan while receiving nothing of value in exchange. The trustee seeks to avoid and recover the payments as actual or constructive fraudulent transfers under California fraudulent transfer law, by way of § 544(b) of the Bankruptcy Code. (Although the complaint states at the beginning that "the action includes claims avoiding and recovering fraudulent transfers under 11 U.S.C. §§ 548 and 550" (Trustee's Compl., DN 1, at 2:5-7), that is the last mention of those code sections and the complaint includes no claims for relief under those sections.)

Battle Creek makes several arguments for its theory that the complaint fails to state a claim upon which relief can be granted. None is availing. Battle Creek contends, first, that "Plaintiff has not alleged facts to show that Battle Creek colluded with the debtor or actively participated in the scheme." Battle Creek's P. & A., DN 9, at 12:22-24. Battle Creek cites Cal. Civ. Code § 3439.08(a)[2] and quotes Lewis v. Superior Court, 30 Cal. App. 4th 1850 (1994) for the proposition that "[t]he term good faith . . . means that the transferee did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor." P. & A. at 13:23-24, quoting Lewis, 30 Cal. App. 4th at 1858-59. On that basis, Battle Creek concludes that "Plaintiff fails to allege that Battle Creek had actual knowledge that the transfers were fraudulent or that Battle Creek colluded with IMG. Thus, Plaintiff has failed to show that Battle Creek did not accept the IMG payments in good faith." P. & A. at 14:4-6. Similarly, Battle Creek cites Cal. Civ. Code § 3439.08(e)[3] as "requir[ing] the Plaintiff to affirmatively allege facts showing that Battle Creek colluded with the debtor when it agreed to accept the monthly payments tendered by IMG." Id. at 15:13-15.

Good faith is an element of an affirmative defense that may be asserted by a defendant in an actual fraudulent transfer action. Cal. Civ. Code § 3439.08(a); see also AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 707 (9th Cir. 2008); Elite Personnel, Inc. v. Barclay (In re AFI Holding, Inc.), 2006 Bankr. LEXIS 4793, *10 (9th Cir. BAP 2006); Neilson v. E. & F. Fin. Servs. (In re Cedar Funding, Inc.), 2011 Bankr. LEXIS 4572, *8 (Bankr. N.D. Cal. 2011) (all referring to § 3439.08 as creating affirmative defenses). Enforcement of a lien in a noncollusive manner and in compliance with applicable law is an affirmative defense to a constructive fraudulent transfer action. Cal. Civ. Code § 3439.08(e); General Elec. Capital Auto Lease v. Broach (In re Lucas Dallas Inc.), 185 B.R. 801, 810 (9th Cir. BAP 1996). Thus, "[i]t is not incumbent on the plaintiffs to plead lack of good faith on defendants' part . . . ." Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Grp., LLC), 362 B.R. 624, 639 (Bankr. S.D.N.Y. 2007).[4] Further, "[d]ismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint." Asarco, LLC v. Union Pac. R.R. Co.,765 F.3d 999, 1004 (9th Cir. 2014).[5] Here, except for charging the trustee with failing to allege knowledge or collusion on the part of Battle Creek, an allegation that was not required, Battle Creek does not argue the complaint is defective on its face. As for the trustee's "failure to show" lack of good faith on Battle Creek's part, that is a matter of proof, not of pleading; it is not appropriately considered on a motion to dismiss.

Battle Creek makes a similar argument with respect to the issue of reasonably equivalent value: it states that "[f]or a transfer to be avoided under § 3439.04(a)(2) . . . a trustee must show that the debtor made the transfer . . . without receiving reasonably equivalent value in exchange for the transfer." P. & A. at 14:7-9, quoting AFI Holding, Inc., 525 F.3d at 707. Unlike good faith, the issue of reasonably equivalent value received in exchange for a challenged transfer is an element of the plaintiff's case-in-chief in an action to recover a

constructive fraudulent transfer. See Cal. Civ. Code § 3439.04(a)(2). However, the complaint in this case contains allegations concerning the issue. It states: "Despite these transfers [to Battle Creek], the Debtor did not receive any actual benefit from making those payments. In fact, N9FX LLC, a company unrelated to IMG, owned the Aircraft [] at the time the finance agreement with Battle Creek was entered into. The Debtor owed no debt to Defendants, yet IMG paid the bills." Compl. at 1:18-21. The complaint adds: "The Debtor received no value or less than reasonably equivalent value in exchange for all, or many of, the transfers . . . ." Id. at 8:11-12.

Battle Creek does not contend those allegations are insufficient to state a claim to relief. Instead, it cites a proof of claim filed by Larry Carter in IMG's underlying bankruptcy case for $23,313,469. Battle Creek notes that no objection to the claim has been filed and relies on the proposition that "[a] reduction of liability constitutes an exchange of reasonably equivalent value for fraudulent transfer purposes." P. & A. at 14:14-15, citing Marshack v. Wells Fargo Bank (In re Walters), 163 B.R. 575, 581 (Bankr. C.D. Cal. 1994). From those statements, Battle Creek concludes that "[h]ere, IMG made the payments on Battle Creek's loan to reduce IMG's liability to Carter. Thus, IMG received reasonably equivalent value in exchange for the payments." P. & A. at 14:21-23.

Resolution of a reasonably equivalent value issue, whether as an element of the trustee's case-in-chief under § 3439.04(a)(2) or of an affirmative defense under § 3439.08(a), is not proper on a motion to dismiss. In ruling on a motion to dismiss, the court is not to weigh the evidence, it is only to "assess[] whether the complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949 (citations omitted; internal quotation marks omitted). Whether the debtor received reasonably equivalent value is a question of fact; resolution of the issue "is not proper in the context of a motion to dismiss under Civil Rule 12(b)(6)." Aletheia Research, 2015 Bankr. LEXIS 4145, *23; Peterson v. Atradius Trade Credit Ins., Inc. (In re Lancelot Investors Fund, LP), 451 B.R. 833, 841 (Bankr. N.D. Ill. 2011).[6]

Battle Creek also quotes from the trustee's complaint against Carter and others in Adv. Proc. No. 15-2122, and in particular, allegations in that complaint that Carter and IMG's principal, Deepal Wannakuwatte, entered into a joint venture agreement under which Carter provided cash to IMG for its business. From this, Battle Creek asks the court to draw what it calls the "reasonable inference" that "IMG's payments on the Battle Creek loan were repayment to Carter [of] monies owed under the joint venture agreement." Battle Creek's Reply, DN 47, at 10:14-17. Citing Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC), 530 B.R. 711 (Bankr. C.D. Cal. 2015), Battle Creek contends this court "ha[s] to accept" the factual allegations in the trustee's complaint against Carter as true. Reply at 10:12-13. Battle Creek relies on this statement in Owner Mgmt. Serv.: "The Court may consider the records in this case, the underlying bankruptcy case and public records." 530 B.R. at 717.

Owner Mgmt. Serv. involved a motion for summary judgment, not a motion to dismiss. The test on a motion to dismiss is this:

> [A] court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. However, in order to "[p]revent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . .

documents upon which their claims are based," a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned.

Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The trustee's complaint against Carter, et al., does not fall within any of those categories. At most, the court might take judicial notice of the fact of the trustee's filing of that complaint; it cannot take judicial notice of the truth of the factual allegations in the complaint. See Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001). Finally, although on a motion to dismiss, the court is to "accept as true all facts alleged in the complaint" (al-Kidd, 580 F.3d at 956), Battle Creek has cited no authority for the proposition that the court must take as true all facts alleged by the same plaintiff in other adversary proceedings.

Finally, Battle Creek argues the trustee's second and fourth claims for relief are not independent causes of action but remedies. The first and third claims for relief state claims to avoid actual and constructive fraudulent transfers, under Cal. Civ. Code § 3439.04(a)(1) and (2), respectively, whereas the second and fourth for relief purport to state claims to recover the value of the transfers, pursuant to Cal. Civ. Code § 3439.07(a)(1). As the trustee points out, Battle Creek cites no authority for the proposition that the second and fourth claims may not be stated separately from the first and third. In contrast to the ample authority for the proposition that certain types of purported claims for relief are really remedies, not separate claims for relief,[7] there is at least some authority to the effect that avoidance and recovery of fraudulent transfers are distinct concepts. See In re Flashcom, Inc. v. Communs Ventures III, LP (In re Flashcom, Inc.), 503 B.R. 99, 111-15 (C.D. Cal. 2013). Battle Creek has not indicated the separate statement of the claims has generated any confusion as to the trustee's allegations or the relief sought, and absent any suggestion of possible prejudice, the court will not dismiss the second and fourth claims for relief.

For the reasons stated, the court will conditionally grant the motion for lack of personal jurisdiction, as described above, and will deny the motion insofar as it is based on Rule 12(b)(6). The court will hear the matter.

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> [M]inimum contacts with a particular district or state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries. . . . It is clear that Congress can provide for nationwide service of process in federal court for federal question cases without falling short of the requirements of due process.

Id. (citation omitted).

2 Cal. Civ. Code § 3439.08(a) provides, "A transfer or obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee."

3 Cal. Civ. Code § 3439.08(e) provides, "A transfer is not voidable under

paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from . . . Enforcement of a lien in a noncollusive manner and in compliance with applicable law . . . ."

4 See also Brandt v. KLC Fin., Inc. (In re Equip. Acquisition Res., Inc.), 481 B.R. 422, 429 (Bankr. N.D. Ill. 2012) ("Inasmuch as the defense provided by section 548(c) constitutes an affirmative defense, and not an element of the Plaintiff's claim, it is unnecessary for Plaintiff to preemptively plead facts negating Defendant's good faith."); Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC), 440 B.R. 243, 256 (Bankr. S.D.N.Y. 2010) ("[A] trustee need not dispute a transferee's good faith defense upon the face of the Complaint.").

5 "[T]he defense of 'good faith' is fact-specific and should not be considered in the context of a motion to dismiss." Golden v. Clay Lacy Aviation, Inc. (In re Aletheia Research), 2015 Bankr. LEXIS 4145, *20 n.7 (9th Cir. BAP 2015).

6 Battle Creek cites several cases in its analysis of the law concerning the reasonably equivalent value issue. Reply at pp. 7-9. In each of them, the issue arose in the context of either a summary judgment motion or a trial. Thus, the cases are not relevant to this motion.

7 See Powell v. Wells Fargo Home Mortg., 2015 U.S. Dist. LEXIS 104052, *47 (N.D. Cal. 2015) ("Rescission is a remedy, not a cause of action."); Chanthavong v. Aurora Loan Servs., 448 B.R. 789, 802 (E.D. Cal. 2011) ("An injunction is a remedy, not a claim in and of itself.").

5. 15-20131-D-7 HCS-4 **Final ruling:**	RICHARD/DIANA BRAMWELL	MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM, CRABTREE & SUNTAG FOR DANA A. SUNTAG, CHAPTER 7 TRUSTEE(S) 7-27-16 [44]

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

6. 15-23231-D-7 WFM-1 BANK OF AMERICA, N.A. VS.	DEAN ENGEL	MOTION FOR RELIEF FROM AUTOMATIC STAY 7-25-16 [70]

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received his discharge on July 28, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

7. 15-23746-D-7 GORDON BONES MOTION FOR CHANGE OF VENUE
7-27-16 [69]

Tentative ruling:

This is the motion of Melissa Joseph, as Trustee of the Richard W. De Silva Revocable Living Trust, dated June 19, 2007, as amended, and Julie Ana DeSilva, by and through her guardian ad litem, Melissa Joseph, to change the venue of a chapter 13 case presently pending in the bankruptcy court for the Southern District of Indiana to this court. The debtor in the Indiana case, Gordon Glen Bones, is also the debtor in this case. This case was filed by the debtor on May 7, 2015; the Indiana case was filed by the debtor on June 8, 2016. No opposition to this motion has been filed. For the following reasons, the court intends to grant the motion. In addition, the court will hear from the debtor whether he wants the Indiana case, after it is transmitted to this court, to be dismissed, as he has requested in Indiana. If so, the court will dismiss that case with a 180-day bar to re-filing.

Under the applicable rule, in the circumstances of this case and the case in Indiana, the moving parties' filing of the motion in this court was appropriate. "If petitions commencing cases under the Code . . . are filed in different districts by, regarding, or against . . . the same debtor, . . . , the court in the district in which the first-filed petition is pending may determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed." Fed. R. Bankr. P. 1014(b); see also In re Lawrence & Assoc., LLC, 2009 Bankr. LEXIS 1845, *16 (Bankr. D. Idaho 2009) ["The court in which the first filed case is pending is the appropriate court to decide the venue issue."].

When this bankruptcy case was filed, on May 7, 2015, the moving parties were the plaintiffs and the debtor was the defendant in an action pending in the Sacramento County Superior Court. The moving parties are two of the beneficiaries of a family living trust, the trustor of which was represented at times during the estate planning process by the debtor, who is an attorney. In their complaint in the state court action, the moving parties alleged the debtor committed legal malpractice in connection with a trust challenge in state court, falsely inflated fees for his legal services, and filed and recorded a UCC-1 financing statement falsely claiming a security interest in certain real properties belonging to the trust or the trustor.[1] The debtor commenced his bankruptcy case in this court roughly one hour before the state court was due to issue a tentative ruling on the moving parties' motion to compel the debtor to produce documents, with the result that the automatic stay prevented the state court from ruling on the motion.

The moving parties then filed an adversary complaint against the debtor in this court, making allegations similar to those in their state court complaint. The debtor filed two motions to dismiss the adversary complaint for failure to state a claim upon which relief can be granted. The first was denied for procedural reasons; the second was denied without prejudice. In addition, this court lifted the automatic stay to permit the parties to proceed with the state court litigation, with (1) the parties to return to this court for a determination of the dischargeability issues if necessary, and (2) enforcement of any state court judgment other than for injunctive relief to be left to this court. The court also stayed the adversary proceeding pending further court order. The order staying the adversary proceeding and lifting the stay to permit the state court action to go forward was entered December 10, 2015.

The moving parties promptly proceeded with a motion to compel discovery responses and sanctions against the debtor in state court. On February 26, 2016, at a hearing at which the debtor appeared, the state court issued an order requiring the debtor to serve responses to the moving parties' request for production of documents, together with responsive documents, no later than March 11, and ordered him to pay the moving parties' attorney's fees and costs, $1,260, no later than March 28. The debtor did neither. On March 21, the moving parties filed a second motion to compel. On April 11, the debtor sent an email to the moving parties' counsel stating he would file for bankruptcy "either later today, but more likely tomorrow," but he did not do so. Nor did he file opposition to the second motion to compel, although he did request a hearing on the court's tentative ruling.

At the April 18 hearing on the moving parties' second motion to compel, the debtor informed the state court he had filed a notice of appeal from the order on the first motion to compel. The court responded that an order granting a motion to compel and awarding sanctions of under $5,000 is not appealable, and noted that, in any event, the debtor's appeal had been dismissed. The court found the "Defendant [the debtor] had no valid basis to fail to comply with the Court's order." Moving Parties' Ex. B. Thus, the court ordered the debtor to comply with its February 26, 2016 order no later than April 28 and to pay additional attorney's fees and costs of $960 to the moving parties by May 18. The court also cautioned the debtor that "further misuse of the discovery process may subject Defendant to additional and potentially more severe sanctions." Id.

On Sunday, April 24, four days before the debtor's responses and documents were due under the second order, his paralegal emailed the moving parties' counsel stating that an ex parte hearing had been set for 9:30 a.m. on Tuesday, April 26 to "address the ongoing discovery issues including the possible need for a discovery referee." When the moving parties' counsel asked the debtor to continue the hearing because he had a conflicting hearing on April 26, the debtor refused unless the moving parties' counsel would give him until late May to produce the responses and documents that were then due April 28. The moving parties' counsel declined and the debtor refused the request for a continuance. Then, at 2:27 p.m. on Monday, April 25, the debtor emailed the moving parties' counsel stating that "rather than going forward with the ex-parte tomorrow at 9:30, as a courtesy to you, it has just been cancelled."[2]

The debtor then produced a few documents, together with an unverified and unsigned response to the request for production, along a flash drive of unidentified documents, and provided what the moving parties considered to be incomplete and improper responses to interrogatories the moving parties had served on March 10. The moving parties filed a motion for terminating sanctions against the debtor, contending "[i]t is now clear that Defendant will not comply with his discovery obligations no matter what this Court does." Moving Parties' Ex. C. On June 8, 2016, two days before his opposition to the motion for terminating sanctions was due, the debtor filed a chapter 13 petition in the bankruptcy court for the Southern District of Indiana.

On the petition, the debtor stated under oath he lives in Bloomington, Indiana and that he chose to file in the Southern District of Indiana because, over the prior 180 days, he had lived in that district longer than in any other district. In other words, he stated that of the prior six months, he had lived longer in Indiana than he had in the Eastern District of California. Yet as of this date, the debtor has not notified this court of the change in his address, as required by Fed. R.

Bankr. P. 4002(a)(5). Further, in the Indiana case, he described all of his household furniture and fixtures as being located in California. Where asked on his Statement of Financial Affairs whether he had lived anywhere else in the last three years other than where he lives now, he listed the same street address in Citrus Heights, California he had listed as his residence on his petition filed in this case, but where required to state the dates he had lived there, he left the answer blank. Where required to list the names and addresses where he has done business in the past four years, the debtor listed Bones Law Firm but did not list any addresses. In other words, in both places where he was required to list information from which the court might determine how long he has actually lived in Indiana, so as to support venue of the new case in that state, the debtor declined to answer. Strangely, however, in his chapter 13 plan filed in the Indiana case, he proposed to "accept" (assume) his unexpired lease of the premises in Sacramento where, according to his Schedule G in this case, Bones Law Firm conducts business.

In the Indiana case, where required to state whether, within the one year before filing the case, he had been a party to any lawsuit, court action, or administrative proceeding, the debtor answered No, despite the fact he was, of course, well aware of the pending litigation in Sacramento County Superior Court as well as the bankruptcy case in this court. The debtor disclosed in the Indiana case that he had had income from the operation of his business totaling $174,328 in 2014, whereas in the case in this court, where required to disclose his income in 2013 and 2014, he listed his and his wife's income in 2012 and 2013 instead, which were much lower figures than his 2014 income, and listed nothing for 2014. In other words, he concealed from the court, the trustee, and the creditors in this case $174,328 in income he was unequivocally required to disclose.

On June 20, 2016, the debtor filed in the Indiana case a Motion for Enforcement of Automatic Stay seeking a determination that the automatic stay that went into effect upon the filing of the Indiana case applied to the moving parties' motion for terminating sanctions, which was set to be heard three days later by the Sacramento County Superior Court. On June 29, the debtor filed a withdrawal of his motion to enforce the stay, stating that the state court had denied the motion for terminating sanctions (presumably, on the basis of the automatic stay), and therefore, "since the Offending Motion is no longer at issue, the requested relief from [the Indiana] Court is moot." Withdrawal of Motion for Enforcement of the Automatic Stay, filed June 29, 2016, DN 23 in Case No. 16-04415, Bankruptcy Court for the Southern District of Indiana ("Case No. 16-04415").

On July 27, the moving parties filed this motion to change venue in this court and on August 2, the debtor, apparently having no further need – at least no immediate need – for the benefit of an automatic stay, filed a motion to dismiss the Indiana case. He stated the following:

> 2. Debtor's non filing spouse has taken a new employment position which requires the Debtor to focus on relocating his household, including his 12 year old son.
>
> 3. Debtor is not eligible for discharge in the instant bankruptcy and was utilizing the same for the purpose of structuring a payment with taxing authorities.
>
> 4. Due to the relocation costs and Debtor's need to focus on finding local permanent employment, Debtor will not currently be able to fund a

feasible plan.

Voluntary Motion to Dismiss, filed August 2, 2016 in Case No. 16-04415. The next day, August 3, the moving parties filed in the Indiana case an objection to the dismissal motion, suggesting the motion had been filed to moot the venue motion in this court. The moving parties asked the Indiana court to defer a ruling on the motion to dismiss pending this court's ruling on the venue motion. They added that if this court denied the venue motion and the Indiana court were then prepared to dismiss that case, the moving parties requested the case be dismissed with a 180-day bar to re-filing. On August 4, 2016, the Indiana court set the debtor's motion to dismiss for hearing on August 30, 2016.

The overall test for determining a venue issue under Rule 1014(b) is "the interest of justice or . . . the convenience of the parties." Fed. R. Bankr. P. 1014(b). The specific factors the court is to consider include: "1. The proximity of creditors of every kind to the court; 2. The proximity of the bankruptcy (debtor) to the court; 3. The proximity of the witnesses necessary to the administration of the estate; 4. The location of the assets; 5. The economic administration of the estate; and 6. The necessity for ancillary administration." Lawrence & Assoc., 2009 Bankr. LEXIS 1845 at *16-17. There is no indication in any case from a court within the Ninth Circuit that has cited Rule 1014(b) that these factors are exclusive, and in this case, the court finds the debtor's bad faith to be the predominant factor.

The court has no hesitation in concluding that the debtor filed the Indiana case for the primary, if not sole, purpose of preventing the Sacramento County Superior Court from ruling on the moving parties' motion for terminating sanctions. The debtor had by then disobeyed two earlier court orders that he produce responses and documents; in response to one of those orders, he had threatened the moving parties' attorney with another bankruptcy filing; and he timed the filing of the Indiana case so he would have an excuse not to file opposition to the motion for terminating sanctions. Then he failed utterly to comply with his duty of complete and accurate disclosure in the Indiana case, making under oath statements that were blatantly inaccurate or incomplete. None of the creditors scheduled in either case is in Indiana. Of the 10 creditors listed in the Indiana case, eight are in California; the other two are the IRS and student loan creditor Navient, at an address in Philadelphia. As far as the debtor's residence is concerned, the court is not remotely convinced the proper venue for the Indiana case was the Southern District of Indiana to begin with.

For all of these reasons, the court concludes that in the interest of justice and for the convenience of the parties, the Indiana case should be transferred to this district, and the court will issue an order transferring the case forthwith. In addition, if the debtor appears at the hearing on this motion and expresses an intention to prosecute the motion to dismiss he filed in the Indiana case, the court will dismiss that case on the terms set forth below. If the debtor contests those terms, or if he does not appear at the hearing on this motion to change venue, the court will transfer venue to this court and the hearing will be continued to September 21, 2016 at 10:00 a.m. The debtor will be required to file a response to the court's intended dismissal on the terms set forth below no later than September 7, 2016, with all factual allegations to be made under oath.

The court hereby gives the debtor notice of its intent to dismiss the case transferred from Indiana with a 180-day bar to filing any bankruptcy case in any district in the United States. It is clear to the court the debtor willfully failed

to appear before the Indiana court in proper prosecution of the case because he did not file the case for any proper purpose and because he failed to comply with his duty to file true, complete, and accurate schedules and statements. See Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 417 (9th Cir. BAP 2007) [debtor has a duty 'to prepare the bankruptcy schedules and statements 'carefully, completely, and accurately . . . .'"]. Therefore, the case may be dismissed with a 180-day bar to re-filing under § 109(g)(1).

As a general rule, a debtor has the right to have a chapter 13 case dismissed. § 1307(b). However, "the debtor's right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or 'to prevent an abuse of process.'" Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 773-74 (9th Cir. 2008), citing § 105(a) of the Bankruptcy Code. Therefore, the debtor does not have the absolute right to have the Indiana case dismissed without prejudice. Further, this court has the power, under §§ 105(a) and 349(a), to dismiss a bankruptcy case, including a chapter 13 case, "with prejudice"; that is, with a bar to re-filing. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999); In re Glover, 2011 Bankr. LEXIS 1784, *6-7 (9th Cir. BAP 2011). Finally, the court has the power, under § 105(a), to raise the issue of dismissal with prejudice sua sponte. Glover, 2011 Bankr. LEXIS 1784 at *6.

The court will hear the matter.

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1 The debtor also was and is the plaintiff in a state court action against the moving parties for alleged unpaid attorney's fees.

2 The quotations in this paragraph are from the moving parties' memorandum of points and authorities in support of their motion for terminating sanctions filed in the state court action, Moving Parties' Ex. C. The statements in these quotations have not been submitted in admissible form in connection with the present motion; however, the debtor has raised no objection.

8.	16-20948-D-7 ASF-2	AMRIK/INDERJIT DULAI	MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S) 7-18-16 [55]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

9.	10-42050-D-7 HLC-10	VINCENT/MALANIE SINGH	OBJECTION TO CLAIM OF AMANPREET AND FRANCIS LAL, CLAIM NUMBER 10 7-25-16 [643]
10.	10-42050-D-7 HLC-115	VINCENT/MALANIE SINGH	OBJECTION TO CLAIM OF SATYA NAND, CLAIM NUMBER 115 7-25-16 [661]
11.	10-42050-D-7 HLC-174	VINCENT/MALANIE SINGH	OBJECTION TO CLAIM OF PRAMILLA SHANKAR, CLAIM NUMBER 174 7-25-16 [667]
12.	10-42050-D-7 HLC-49	VINCENT/MALANIE SINGH	OBJECTION TO CLAIM OF KESHWAR AND SAVITA SINGH, CLAIM NUMBER 49 7-25-16 [649]

13. 10-42050-D-7 VINCENT/MALANIE SINGH — OBJECTION TO CLAIM OF VIJAY RAM, CLAIM NUMBER 50
HLC-50 — 7-25-16 [655]

14. 16-21951-D-7 YOLANDA JARAMILLO — MOTION FOR RELIEF FROM AUTOMATIC STAY
EAT-1 — 7-27-16 [25]

WELLS FARGO BANK, N.A. VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on July 27, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

15. 14-20064-D-7 GLENN GREGO — MOTION FOR RELIEF FROM AUTOMATIC STAY
ASW-2 — 7-15-16 [634]

CITIBANK, N.A. VS.

Final ruling:

This matter is resolved without oral argument. This is Citibank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

16. 16-23165-D-7 SHANNON KESSENICH — MOTION FOR RELIEF FROM AUTOMATIC STAY
KAZ-1 — 7-15-16 [16]

U.S. BANK, N.A. VS.

Final ruling:

This matter is resolved without oral argument. This is U.S. Bank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

17. 15-21876-D-7 LILLIAN PENTON — MOTION TO DISMISS ADVERSARY PROCEEDING
16-2124 — 7-15-16 [7]
MEDINA V. PENTON

Final ruling:

This adversary proceeding has been transferred to Department B of this court by order dated August 12, 2016. The hearing on this motion will be continued to August 30, 2016 at 9:30 a.m. in Department B, Courtroom 32.

18. 16-22183-D-7 JOHN/AMANDA ANTICH — MOTION TO SELL
BLL-3 — 7-22-16 [30]

19. 13-35288-D-7 DUSTIN/KAREN BOLE — MOTION FOR SUMMARY JUDGMENT
14-2097 — MGB-5 — 7-27-16 [164]
GENERAL COUNCIL OF THE ASSEMBLIES OF GOD V. BOLE ET

Tentative ruling:

This is the motion of the plaintiff, General Council of the Assemblies of God, for partial summary judgment against the defendants, Dustin Bole and Karen Bole. The defendants have filed opposition and the plaintiff has filed a reply. For the following reasons, the motion will be granted.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. The moving party has 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).

The plaintiff's motion raises a single issue: what is the effect to be given certain portions of a pre-petition default judgment rendered by the federal district court for the Northern District of Illinois in favor of the plaintiff and against the defendants (and others). The judgment awarded the plaintiff both monetary and injunctive relief; in the latter category, it awarded both prohibitory and mandatory injunctive relief.[1] Only the prohibitory injunction aspects of the judgment are at issue in this motion. Specifically, the plaintiff seeks a determination that those portions of the judgment imposing prohibitory injunctions against the defendants are not dischargeable. The plaintiff cites substantial case authority for the proposition that an injunction that prohibits future conduct and is not a remedy in lieu of a monetary payment is not dischargeable in bankruptcy. Based on the case law and analysis presented by the plaintiff, and as a matter of the correct application of the definitions in the Bankruptcy Code, the court concludes that such an injunction is not dischargeable and that the obligations created by the specific prohibitory injunctions in the judgment are nondischargeable.

The defendants point to this court's ruling dated June 24, 2015 on an earlier motion for summary judgment made by the plaintiff, in which the court found that the district court judgment is not entitled to preclusive effect in this adversary proceeding. Thus, the defendants claim, the court has already ruled on the plaintiff's motion for summary judgment. They conclude the plaintiff is "asking this Court to pick and choose what summary judgements to impose, without due process to prove if the Defendants acted willfully and maliciously . . . ." Defendants' Opposition, DN 171, at 1:21-23. The defendants are incorrect for the simple reason that the issues presented in the two motions are entirely different. In the first, the court framed the issue as follows: "Relying on the doctrine of issue preclusion, the plaintiff contends the issue of whether its claim arose from willful and malicious injury by the defendants has been conclusively determined by a pre-petition judgment of the federal district court . . . ." Civil Minutes for June 24, 2015, DN 98, p. 2. This court held the claim had not been conclusively determined.

The question involved in the present motion is whether the prohibitory injunctions in the district court judgment constitute "claims" to begin with, as defined in the Bankruptcy Code, such that they could ever be subject to a bankruptcy discharge. The answer is no. A chapter 7 discharge discharges the debtor from all pre-petition "debts." § 727(b). A "debt" is a liability on a claim. § 101(12). A "claim" is a "right to payment" (§ 101(5)(A)) or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . . ." § 101(5)(B). As the plaintiff correctly points out, the prohibitory injunctions in the judgment were not entered as an alternative to a "right to payment"; therefore, the obligations under those injunctions are not "claims" or "debts," and thus, are not dischargeable.

The plaintiff's analysis of the Chateaugay Corp. decision, In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991), provides a clear example of the distinction between an injunction that creates a dischargeable debt and one that does not. As the plaintiff explains it, in the context of environmental laws, the distinction is between "(1) an injunction against a Debtor prohibiting future continued pollution, and (2) an order requiring cleanup of a physical site based on previous pollution." Plaintiff's P. & A., DN 166, at 3:9-10, citing Chateaugay Corp., 944 F.2d at 1008. The latter creates a dischargeable obligation because, as an alternative to the injunction, the creditor could do the clean-up work itself and sue the debtor for recovery of the costs, thus creating a "right to payment," and hence, a "claim" and a "debt." The former – an injunction against future pollution – does not create an obligation to which an alternative right to payment exists. See id. "EPA is entitled to seek payment if it elects to incur cleanup costs itself, but it has no authority to accept a payment from a responsible party as an alternative to continued pollution." Id.

Similarly, in Ohio v. Kovacs, 469 U.S. 274 (1985), the Court held that a pre-petition injunction requiring the debtor to clean up a hazardous waste site was a "claim"; the debtor therefore owed a "debt" to the State of Ohio; and the debt was dischargeable. 469 U.S. at 283. The Court observed:

> What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.

Id. In contrast, the Court made clear what it was not holding. "We do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address, as did the Court of Appeals, only the affirmative duty to clean up the site and the duty to pay money to that end." Id. at 284-85.

The Ninth Circuit Bankruptcy Appellate Panel has suggested, albeit in dicta, a similar approach to the issue of an injunction prohibiting the debtors from interfering with an easement.

> We also question whether the permanent injunction portion of the Judgment can ever be nondischargeable. Both §§ 523 and 1328(a)(4) except only debts from discharge. The Code defines "debt" as a "liability on a claim." 11 U.S.C. § 101(12). A "claim," in turn, refers either to a payment or to certain equitable remedies. 11 U.S.C. § 101(5)(A)-(B). [¶] Here, the permanent injunction enjoined the Debtors from interfering with the easement in the future and does not facially provide a right to payment. Determining whether the injunction is a claim pursuant to § 101(5)(B) turns on whether it gives rise to an alternative or corollary right to payment. [Citing Chateagay Corp.] Nothing in the current record establishes that the Debtors have the option to pay the [plaintiffs] so as to continue interfering with the easement.

Toste v. Smedberg (In re Toste), 2014 Bankr. LEXIS 3441, *11-12 n.7 (9th Cir. BAP

2014).

The same reasoning applies here. With respect to the prohibitory injunctions in the district court judgment, the defendants have not demonstrated that the plaintiff has a right to payment as an alternative to the defendants ceasing to use what the district court determined were the plaintiff's trademarks or that the plaintiff could be compelled to accept a payment of money in exchange for the defendants continuing to infringe what the court found to be the plaintiff's copyright. As such, the breach of performance that gave rise to the prohibitory injunctions did not give rise to an alternative "right to payment" or a "claim," such that the defendants owe a "debt" to the plaintiff that could be dischargeable in bankruptcy at all.

Like the Court in Kovacs, this court will make clear what it is not deciding. It is not, as the defendants suggest, determining that they acted willfully and maliciously toward the plaintiff, such that any "debt" created by the district court judgment would be nondischargeable. That question remains in this proceeding for another day. What the court is determining is that the prohibitory injunctions in the judgment are not dischargeable; that is, in essence, they are unaffected by the defendants' bankruptcy case and their bankruptcy discharge and may be enforced or not enforced, as appropriate under applicable law, without reference to the bankruptcy case or the discharge.

In contrast, when this court found in its earlier ruling that the district court judgment was not entitled to preclusive effect in this proceeding, it did so solely for the purpose of determining whether any "debts" arising from the judgment had been conclusively determined to be nondischargeable in bankruptcy. That ruling still stands. This ruling adds only that the prohibitory injunctions in the judgment do not give rise to any "debt" that may be affected by the bankruptcy case or the discharge. In short, the plaintiff has produced evidence in the form of the district court judgment showing there is no genuine issue of material fact as to the effect of the prohibitory injunctions and that the plaintiff is entitled to judgment on that issue as a matter of law. The defendants have suggested no circumstance in which this court could find that the prohibitory injunctions were issued as an alternative to a "right to payment" and the court can think of none. Thus, the defendants have presented no evidence showing the existence of genuine issues of fact for trial as regards the effect of the prohibitory injunctions.

For the reasons stated, the plaintiff is entitled to judgment on that issue and the motion will be granted. The plaintiff is to submit an appropriate order. The court will hear the matter.

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1 A prohibitory injunction prohibits a party from taking certain action; a mandatory injunction requires a party to take some action. See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878-79 (9th Cir. 2009).

20. 15-29890-D-7 GRAIL SEMICONDUCTOR
16-2088 DNL-2
CARELLO V. STERN ET AL

MOTION TO DISMISS THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED
7-18-16 [73]

Final ruling:

This is the motion of defendant The Hongkong and Shanghai Banking Corporation Limited to dismiss the complaint of the plaintiff, who is also the trustee in the underlying chapter 7 case in which this adversary proceeding is pending (the "trustee"), for lack of personal jurisdiction. The trustee has filed opposition. However, the court is not prepared to consider the motion at this time for the following procedural reasons.

First, the moving party utilized a docket control number, DNL-2, which (1) has already been used in this proceeding; and (2) is derived from the initials of the trustee's counsel's firm, both in contravention of LBR 9014-1(c) and both of which promote confusion in the docket. Second, the moving party served only the United States Trustee and counsel for the debtor in the underlying case, whose client is not a party to this adversary proceeding. The moving party failed to serve the trustee, who is the plaintiff, or any of the several other defendants in this proceeding, as required by Fed. R. Civ. P. 5(a)(1)(D), incorporated herein by Fed. R. Bankr. P. 7005. Two of the other defendants had appeared in this action well before the motion was served and the other two have now appeared. Although the trustee waived this service defect by filing opposition, the defendants have not. Third, the proofs of service were filed as attachments to the individual documents, rather than being filed separately, and do not contain captions or the other information required by the court's local rules. (And there is no proof of service attached to the supporting declaration and no other evidence of service of that document.) Counsel is referred to LBR 9014-1 and 9004-1(a), incorporating the court's Revised Guidelines for the Preparation of Documents, Form EDC 2-901.

Finally, the proofs of service do not sufficiently set forth the manner of service. Each contains two boxes that may be checked. The second box, which is the one checked, is for service by mail, and where required to list "the following" parties served, no parties are listed. The first box, which is not checked, is followed by the names and mailing addresses of the Office of the United States Trustee and the debtor's counsel. Thus, because the box was not checked, the proof of service is actually evidence that even those parties were not served. The text of the proof of service makes matters worse. It states, "I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants." In contrast, this court's local rules do not permit service by reliance on the court's CM/ECF system. See LBR 7005-1(d)(1) and (3); see also Fed. R. Civ. P. 5(b)(3) (emphasis added) ["If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E)."].

As a result of these service and other procedural defects, the motion will be denied by minute order. No appearance is necessary.

21. 13-33804-D-7 BHS-5 — RHONDA STIJAKOVICH-SANTILLI

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RHONDA STIJAKOVICH-SANTILLI
8-3-16 [181]

22. 16-24928-D-7 — CYNTHIA SMITH

MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
7-27-16 [5]

23. 16-24040-D-7 — MARCUS GORDON

NOTICE OF HEARING AND OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
7-20-16 [14]

Final ruling:

The debtor appeared at the continued Meeting of Creditors held on August 17, 2016. As such, the trustee's motion to dismiss will be denied by minute order. No appearance is necessary.

24. 16-20948-D-7 DNL-3 — AMRIK/INDERJIT DULAI

MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. LUKE HENDRIX, TRUSTEE'S ATTORNEY
8-1-16 [61]

25. 16-22565-D-7 JOSE DOMINGUEZ
TOG-2

MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB
8-1-16 [29]

26. 16-24488-D-7 OMOTAYO FASUYI
WAJ-1

TOUQUEER SYED VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-9-16 [12]