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MAY 12 2011

3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA

5  
6 In re: ) Case No. 10-37374-D-7  
7 KIRRA DENISE MOORE, )  
8 )  
9 Debtor. )  
10 PALMER J. SWANSON, P.C., ) Adv. Pro. No. 11-2022-D  
11 ) Docket Control No. MHK-2  
12 Plaintiff, )  
13 v. )  
14 KIRRA DENISE MOORE, ) DATE: April 27, 2011  
15 Defendant. ) TIME: 10:00 a.m.  
DEPT: D

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

18 MEMORANDUM DECISION

19 On April 5, 2011, the defendant in this adversary  
20 proceeding, Kirra Denise Moore ("Moore"), filed a first amended  
21 counterclaim ("counterclaim") against plaintiff Palmer J.  
22 Swanson, P.C. ("Swanson"),<sup>1</sup> and on April 13, 2011, Swanson filed  
23 a motion to dismiss the counterclaim, Docket Control No.  
24 MHK-2 (the "Motion").<sup>2</sup> For the reasons set forth below, the

25  
26 1. "Swanson" as used herein will mean either Palmer J.  
27 Swanson, P.C., or its principal, Palmer J. Swanson, or both, as  
appropriate for the context.

28 2. At an April 13, 2011 hearing on Swanson's motion to  
dismiss Moore's original counterclaim, the court granted  
Swanson's request to shorten the time for notice of the present  
Motion, such that the April 27, 2011 hearing would be a final

1 court will grant the Motion in part.

2 By its complaint in this proceeding, Swanson seeks to deny  
3 Moore's discharge pursuant to various subsections of § 727(a),<sup>3</sup>  
4 or in the alternative, to dismiss Moore's bankruptcy case  
5 pursuant to § 521(e)(2)(C). In response, Moore filed the  
6 counterclaim, in which she challenges Swanson's status as a  
7 creditor, seeks general and punitive damages and attorney's fees,  
8 and asks that the court refer Swanson to the State Bar for  
9 disciplinary action. To summarize, Moore alleges that Swanson,  
10 an attorney, had at some point in time provided legal services to  
11 Moore for which she had paid him in full; that she referred a  
12 third party, Steve Leus, to Swanson for representation in a  
13 probate case; that Swanson provided services to Leus; that  
14 Swanson later attempted to charge Moore for those services and  
15 knowingly made fraudulent representations about Moore in his  
16 attempt to collect for those services.

17 A. The First Through Sixth Causes of Action

18 Moore's first through fifth causes of action charge Swanson  
19 with violations of the California Business & Professions Code  
20 (charging for attorney's fees over \$1,000 without a written  
21 agreement, refusal to provide billing statements), fraudulently  
22 seeking attorney's fees not due (in state court and in this  
23 case), and charging unreasonable fees. These allegations all go

24 \_\_\_\_\_  
25 hearing. A written order shortening time was filed April 14,  
26 2011.

27 3. Unless otherwise indicated, all Code, chapter, and  
28 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
1532. All Rule references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 to the issue of whether Swanson is a creditor of Moore with  
2 standing to pursue the complaint to deny her discharge. Moore's  
3 sixth cause of action -- for declaratory relief -- frames this  
4 issue specifically: she seeks a declaration that Swanson is not  
5 a creditor and lacks standing to pursue the adversary proceeding.  
6 In short, the first six "causes of action" are all in the nature  
7 of defenses to any claims Swanson may have against Moore.<sup>4</sup> They  
8 do not state affirmative claims for relief against Swanson, and  
9 for that reason, they will be dismissed.

10 However, the issues raised in these six causes of action are  
11 sufficiently raised in Moore's amended answer to the complaint to  
12 be treated as affirmative defenses in this proceeding.<sup>5</sup> Moore  
13 may pursue discovery on these issues and present them at trial or  
14 by way of an appropriate pretrial motion. The court need not and  
15 does not express any opinion on the merits of these issues at  
16 this time.

17 B. The Seventh and Eighth Causes of Action

18 In these causes of action, Moore seeks damages for abuse of  
19 process and intentional infliction of emotional distress. These  
20

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21 4. Moore's conclusion to each of these causes of action is:

22 Therefore the Court should deny Plaintiff Swanson's  
23 claim as a creditor, dismiss Plaintiff Swanson's  
24 Adversary Case, award the Debtor attorney fees and  
costs and impose sanctions on Plaintiff Swanson.

25 5. The court will also treat Moore's request for attorney's  
26 fees and costs as incorporated in her amended answer. Swanson  
27 contends the request for attorney's fees is improper because  
28 Moore has no attorney in the adversary proceeding. However, that  
may change, and the request for attorney's fees will be  
determined later, after the court has ruled on the substantive  
issues.

1 claims are based on alleged actions on the part of Swanson both  
2 before and after the date Moore filed her bankruptcy petition.

3 1. Claims Arising Pre-Petition

4 To the extent these claims arose prior to the filing of the  
5 petition, they are property of Moore's bankruptcy estate.

6 § 541(a)(1). As such, these claims are subject to administration  
7 only by the bankruptcy trustee in Moore's case, and Moore has no  
8 standing to pursue them. Dunmore v. United States, 358 F.3d  
9 1107, 1112 (9th Cir. 2004).

10 2. Claims Arising Post-Petition

11 To the extent these claims arose after the filing of the  
12 petition, they do not belong to the bankruptcy estate, they  
13 belong to Moore. Swanson challenges this court's jurisdiction to  
14 hear these claims and contends that even if the court has  
15 jurisdiction to hear them, the claims are not core proceedings.

16 This court, by reference from the district court, has  
17 jurisdiction over "all civil proceedings arising under title 11,  
18 or arising in or related to cases under title 11." 28 U.S.C. §§  
19 1334(b), 157(a). This court may hear and determine "all core  
20 proceedings arising under title 11, or arising in a case under  
21 title 11 . . . ." 28 U.S.C. § 157(b)(1). This court may hear a  
22 non-core proceeding that is otherwise related to a case under  
23 title 11; in such a proceeding, this court would submit proposed  
24 findings of fact and conclusions of law to the district court for  
25 final judgment. 28 U.S.C. § 157(c)(1).

26 The seventh and eighth causes of action of Moore's  
27 counterclaim -- for abuse of process and intentional infliction  
28 of emotional distress -- do not "arise under title 11" because

1 they do not "'involve a cause of action created or determined by  
2 a statutory provision of title 11.'" See Harris v. Wittman (In  
3 re Harris), 590 F.3d 730, 737 (9th Cir. 2009). Moore's claims  
4 are created and determined under state law, not the Bankruptcy  
5 Code.

6 It is a closer question whether these claims "arise in" a  
7 case under title 11. "'[A]rising in' proceedings are those that  
8 are not based on any right expressly created by title 11, but  
9 nevertheless, would have no existence outside of the bankruptcy."  
10 Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d 1431,  
11 1435 (9th Cir. 1995). For example, "[a] state law contract claim  
12 could exist independent of a bankruptcy case, but 'an action  
13 against a bankruptcy trustee for the trustee's administration of  
14 the bankruptcy estate could not.'" Harris, 590 F.3d at 737,  
15 citing Harris Pine Mills, 44 F.3d at 1437.

16 Thus, in Harris, a chapter 7 debtor sued the trustee after  
17 the trustee sold assets of the estate in exchange for the  
18 purchaser's release of claims against the estate that the debtor  
19 alleged had previously been released. The court held that  
20 although the debtor asserted a state law cause of action --  
21 breach of contract, that cause of action "arose in his bankruptcy  
22 case because it could not exist independently of his bankruptcy  
23 case." 590 F.3d at 738.

24 In addition, the debtor's cause of action was a core  
25 proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning the  
26 administration of the estate) because it "arose from the  
27 trustee's post-petition conduct pursuant to the trustee's duty to  
28 administer the bankruptcy estate" and because it alleged that

1 part of the purchase price was the release of "contrived claims."  
2 Thus, the cause of action was "inextricably intertwined with the  
3 sale of assets-the literal administration of the bankruptcy  
4 estate." Id. at 739.

5 Moore's seventh and eighth causes of action, to the extent  
6 they arose post-petition, pertain to Swanson's conduct in  
7 appearing at the meeting of creditors in the capacity of a  
8 creditor, in pursuing a Rule 2004 examination in the capacity of  
9 a creditor, and in filing and prosecuting the complaint to deny  
10 Moore's discharge. As such, these claims have no existence  
11 outside of the underlying bankruptcy case in which Moore seeks a  
12 discharge; thus, they "arise in" this case. Further, these  
13 claims are core proceedings under 28 U.S.C. § 157(b)(2)(O)  
14 because they affect the adjustment of the debtor-creditor  
15 relationship.<sup>6</sup>

16 The decision in MSR Exploration v. Meridian Oil, 74 F.3d 910  
17 (9th Cir. 1996), although cast in terms of preemption, supports  
18 this conclusion. In that case, the bankruptcy court sustained  
19

20 6. The Harris court held that the debtor's claims were not  
21 core proceedings under 28 U.S.C. § 157(b)(2)(N) (orders approving  
22 the sale of property) because they did not challenge the  
23 bankruptcy court's order approving the sale. Instead, the claims  
24 were challenges to the trustee's conduct in selling the assets  
and the purchaser's conduct in relying on previously released  
claims as part of the purchase price; thus, they concerned the  
trustee's administration of the estate, and were core proceedings  
under 28 U.S.C. § 157(b)(2)(A).

25 Similarly, in this case, the court does not base its finding  
26 of a core proceeding on 28 U.S.C. § 157(b)(2)(J) (objections to  
27 discharge) because Moore's causes of action are not objections to  
28 discharge. Instead, the claims challenge Swanson's conduct in  
asserting himself to be a creditor and in pursuing the objection  
to discharge. Thus, they are core proceedings under 28 U.S.C. §  
157(b)(2)(O) because they affect the adjustment of the debtor-  
creditor relationship between Moore and Swanson.

1 the objections of a chapter 11 debtor in possession to claims  
2 filed by a group of creditors. Later, after it had obtained  
3 confirmation of and substantially consummated a plan of  
4 reorganization, the debtor filed a malicious prosecution action  
5 in district court alleging that the creditors had maliciously  
6 filed and prosecuted their claims in the bankruptcy case. The  
7 court held that the malicious prosecution claim was "completely  
8 preempted by the structure and purpose of the Bankruptcy Code."  
9 74 F.3d at 916. Thus, the malicious prosecution claims should  
10 have been brought in the bankruptcy court, and not as a separate  
11 action in the district court. Id.

12 The court had actually framed the issue in even broader  
13 terms, as "whether state malicious prosecution actions for events  
14 taking place within the bankruptcy court proceedings are  
15 completely preempted by federal law." Id. at 912. Given this  
16 broad language, the court finds that Moore's abuse of process and  
17 intentional infliction claims, based as they are on events taking  
18 place within her bankruptcy case, are within the holding of MSR  
19 Exploration, and thus, are within this court's jurisdiction.

20 The court in MSR Exploration emphasized "Congress's intent  
21 to create a whole system under federal control which is designed  
22 to bring together and adjust all of the rights and duties of  
23 creditors and . . . debtors alike." 74 F.3d at 914.

24 While it is true that bankruptcy law makes reference to  
25 state law at many points, the adjustment of rights and  
26 duties within the bankruptcy process itself is uniquely  
and exclusively federal.

27 Id.

28 / / /

1        Similar reasoning governed in Gonzales v. Parks, 830 F.2d  
2 1033, 1035 (9th Cir. 1987), in which a creditor whose foreclosure  
3 had been stayed by the filing of a bankruptcy petition sued the  
4 debtors in state court, alleging that the bankruptcy filing was  
5 an abuse of process. Apart from the question of violation of the  
6 automatic stay, the court held that because the filing of a  
7 bankruptcy petition is a matter of exclusive federal  
8 jurisdiction, the state courts have no authority to determine  
9 whether such a filing is an appropriate one. 830 F.2d at 1035.  
10 "[I]t is for Congress and the federal courts, not the state  
11 courts, to decide what incentives and penalties are appropriate  
12 for use in connection with the bankruptcy process and when those  
13 incentives or penalties shall be utilized." Id. at 1036.

14        Similarly, in the present case, it is appropriate for this  
15 court to decide what penalties, if any, are appropriate for  
16 Swanson's conduct in this bankruptcy case.

17        Finally, in Miles v. Okun (In re Miles), 430 F.3d 1083 (9th  
18 Cir. 2005), after the bankruptcy court dismissed a group of  
19 involuntary bankruptcy cases, relatives of the putative debtors  
20 filed actions in state court alleging, among other things, abuse  
21 of process and intentional infliction of emotional distress based  
22 on the filing of the involuntary petitions. The defendants were  
23 the petitioning creditors in the involuntary cases and their  
24 attorneys. The court of appeals held that § 303(i) provides the  
25 exclusive remedy for damages arising from the filing of an  
26 involuntary bankruptcy petition. 430 F.3d at 1091.

27 / / /

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1       Permitting state courts to decide whether the filing of  
2       an involuntary bankruptcy petition was appropriate  
3       would subvert the exclusive jurisdiction of the federal  
4       courts and undermine uniformity in bankruptcy law by  
5       allowing state courts to create their own standards as  
6       to when a creditor may properly file an involuntary  
7       petition.

8       Id. at 1090, citing MSR Exploration, 74 F.3d at 913-15.

9       For the same reasons, this court concludes that it has  
10       jurisdiction to determine whether Swanson's conduct in asserting  
11       the status of a creditor in this bankruptcy case was appropriate.  
12       As set forth above, the debtor's claims for abuse of process and  
13       intentional infliction of emotional distress, to the extent they  
14       arose post-petition, are proceedings that "arise in" this  
15       bankruptcy case, and are subject to this court's jurisdiction.  
16       Further, as matters affecting the adjustment of the debtor-  
17       creditor relationship between Moore and Swanson, they are core  
18       proceedings under 28 U.S.C. § 157(b)(2)(O).

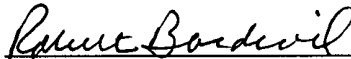
19       Finally, Swanson contends Moore has failed to state a claim  
20       for abuse of process or intentional infliction of emotional  
21       distress. The court finds, however, that the counterclaim  
22       contains "enough factual allegations, taken as true, to plausibly  
23       suggest" that Moore is entitled to relief. See Bell Atl. Corp.  
24       v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945 (2007).

25       For the reasons set forth above, the Motion will be granted  
26       in part. As to the first, second, third, fourth, fifth, and  
27       sixth causes of action of Moore's counterclaim, the Motion will  
28       be granted and the claims dismissed. As to the seventh and  
29       eighth causes of action, to the extent they arose pre-petition,  
30       the Motion will be granted and the claims dismissed. As to the  
31       seventh and eighth causes of action, to the extent they arose

1 post-petition, the Motion will be denied.

2 The court will issue an appropriate order.

3  
4 Dated: May 12, 2011

  
ROBERT S. BARDWIL  
United States Bankruptcy Judge

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CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as assistant to the Honorable Robert S. Bardwil, mailed, or caused to be mailed, by ordinary mail a true copy of the attached document to each of the parties listed below:

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DATE: 5/12/11

  
\_\_\_\_\_  
Andrea Lovgren