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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-09-1066-JuBaD
)		
CEDAR FUNDING, INC.,)	Bk. No.	08-52709
)		
Debtor.)	Adv. No.	08-05312
)		
DAVID A. NILSEN,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
R. TODD NEILSON,)		
)		
Appellee.)		

Argued and Submitted on September 25, 2009
at San Francisco, California

Filed - November 16, 2009

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding.

Before: JURY, BAUM¹ and DUNN, Bankruptcy Judges.

¹ Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the
District of Arizona, sitting by designation.

1 JURY, Bankruptcy Judge:

2
3 Appellant David A. Nilsen ("Nilsen") appeals the bankruptcy
4 court's order dismissing his postpetition complaint against the
5 chapter 11 trustee R. Todd Neilson for alleged defamatory
6 statements about Nilsen made during Cedar Funding, Inc.'s ("CFI")
7 bankruptcy proceeding.

8 This appeal raises two closely related questions, either of
9 which, if answered in the affirmative, would preclude liability
10 against the trustee as a matter of law: whether the trustee was
11 entitled to absolute immunity under federal bankruptcy law, and
12 whether his statements were absolutely privileged under
13 California law. We answer both questions in favor of the
14 trustee.

15 We conclude that the bankruptcy court erred in deciding
16 that the trustee was not entitled to immunity for his allegedly
17 defamatory statements and emphasize that immunity principles may
18 protect a trustee from allegations of libel and slander. The
19 trustee's allegedly defamatory statements were made while
20 performing functions within the scope of his official duties
21 during the administration of CFI's estate. We decide that these
22 functions were judicial in nature because they involved
23 discretionary judgment and were part and parcel of the chapter
24 11 bankruptcy process. Therefore, we determine that the trustee
25 is protected by absolute quasi-judicial immunity under these
26 facts.

1 The court's decision on the trustee's immunity, however,
2 was harmless error because we agree with its conclusion that the
3 trustee's statements were absolutely privileged under California
4 law. As a result, the bankruptcy court's dismissal of Nilsen's
5 complaint was appropriate on this ground alone. We AFFIRM.

6 **I. FACTS**

7 Nilsen was the founder, sole shareholder and president of
8 CFI, a corporation engaged in the mortgage lending business.
9 CFI did not use its own money for loans, but received money from
10 clients which was invested in fractionalized deeds of trust or a
11 mortgage fund² securing loans to borrowers. In March 2008, CFI
12 stopped paying investors their interest payments. Several
13 investors commenced an action against CFI and Nilsen in state
14 court which resulted in the appointment of a receiver to replace
15 Nilsen and take control over CFI's assets on May 22, 2008.

16 A few days later, on May 26, 2008, Nilsen put CFI into a
17 voluntary chapter 11 proceeding presumably so he could regain
18 control of his company. This did not pan out as expected
19 because several investors immediately moved for the appointment
20 of a chapter 11 trustee.³ The investors' motion was based on

21
22 ² On July 11, 2008 the trustee filed a voluntary chapter 11
23 petition on behalf of the fund named Cedar Funding Mortgage Fund
24 ("CFMF") in the Northern District of California, Bankruptcy Case
25 No. 08-53670. The bankruptcy court granted the trustee's motion
to substantively consolidate the estates of CFI and CFMF by
order entered on April 20, 2009.

26 ³ In mid-June 2008, the United States Trustee filed a
27 separate motion supporting the appointment of a trustee. See
28 (continued...)

1 some of the same allegations made in the state court
2 receivership action; i.e., that Nilsen was running a "Ponzi"
3 scheme and made insider loans to himself. On June 17, 2008 the
4 bankruptcy court approved the appointment of a chapter 11
5 trustee.

6 On August 21, 2008 the trustee convened the § 341(a)⁴
7 meeting of creditors. At that meeting the trustee made certain
8 statements to the investors about Nilsen which Nilsen claimed to
9 be defamatory; for example, that Nilsen had "lied", played a
10 "cruel hoax" on them and, in the trustee's opinion, committed a
11 fraud.

12 On September 4, 2008 Nilsen sent a letter (the "September
13 4th Letter") to CFI's investors which contradicted the trustee's
14 statements made at the § 341(a) meeting. Nilsen explained his
15 position regarding CFI's financial condition and accused the
16 trustee of being deceptive. Nilsen also told the investors that
17 the trustee was dismantling the company and their investments
18 and Nilsen asked each investor to request the court to sever
19 their deed(s) of trust from the bankruptcy estate.

20 The trustee responded with his own letter to CFI's
21

22 ³(...continued)
23 § 1104(a) (besides parties in interest, the United States
24 trustee may also request the appointment of a chapter 11
trustee).

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references below are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 investors (the "Rebuttal Letter") to ensure they were not misled
2 by Nilsen's September 4th Letter and posted it on the official
3 bankruptcy website of CFI's estate. In that letter, the trustee
4 made several allegedly defamatory statements about Nilsen,
5 summarized as follows:

- 6 • Mr. Nilsen was knowingly operating a Ponzi
7 scheme;
- 8 • The continuation of the business would only mean
9 more investors would lose their life savings in a
10 hopeless vortex of fraud;
- 11 • that if [investors] had been told the truth, Mr.
12 Nilsen's fraud would have mercifully come to a
13 grinding halt;
- 14 • that Nilsen should account for all of the funds
15 he misappropriated during his tenure with Cedar
16 Funding;
- 17 • that there were others who participated in the
18 financial looting of Cedar Funding; and
- 19 • that Mr. Nilsen had gone directly to the
20 investors with an untruthful recitation of the
21 facts.

22 Nilsen had neither been convicted of any crime nor was he the
23 subject of a criminal investigation at the time the trustee made
24 the above statements.

25 Nilsen commenced an action against the trustee in the
26 Monterey County Superior Court seeking injunctive relief as well

1 as actual and punitive damages on the grounds that the trustee's
2 written and oral statements were defamatory on their face.⁵

3 On November 7, 2008 the trustee filed a notice to remove
4 the case to the bankruptcy court asserting that Nilsen's state
5 court action was a non-core related proceeding under 28 U.S.C.
6 § 1334(b) and that he consented to the bankruptcy judge's entry
7 of a final order or judgment.⁶ The trustee later filed an
8 addendum to the notice of removal which recharacterized Nilsen's
9 action as core because it was inextricably intertwined with the
10 trustee's administration of CFI's estate.

11 At the same time, Nilsen filed a supplement to the notice
12 of removal, citing 28 U.S.C. § 1334(c)(2) (the mandatory
13 abstention provision)⁷ and attached a first amended complaint.

14
15 ⁵ "[I]t is generally held that without leave of the
16 bankruptcy court, no suit may be maintained against a trustee
17 for actions taken in the administration of the estate." Curry
18 v. Castillo (In re Castillo), 297 F.3d 940, 945 (9th Cir. 2002)
19 (citation omitted). Nilsen did not seek leave from the
20 bankruptcy court before suing the trustee, but the court did not
21 discuss this issue in its written order and this oversight is
22 not the subject of this appeal.

23 ⁶ The Monterey County Superior Court clerk initially
24 refused to accept the trustee's notice of removal. At a June
25 26, 2009 hearing the state court determined that the clerk's
26 refusal to accept the removal notice was improper. The matter
27 was then considered removed from state court jurisdiction as of
28 November 13, 2008.

⁷ This section states:

Upon timely motion of a party in a proceeding based
upon a State law claim or State law cause of action,
related to a case under title 11 but not arising under
(continued...)

1 The first amended complaint merely added the allegations that
2 the trustee's statements were neither judicial nor pursuant to
3 the court's orders and were beyond the scope of the court's
4 jurisdiction.

5 On November 17, 2008 the trustee filed a motion to dismiss
6 under Fed. R. Civ. P. 12(b)(6)⁸ on the ground that Nilsen's
7 complaint failed to state a claim upon which relief could be
8 granted because (1) the trustee was absolutely immune under
9 federal bankruptcy law and (2) the trustee's statements were
10 absolutely privileged under California law. In opposition,
11 Nilsen asserted that his state court action was not a core
12 proceeding over which the bankruptcy court had jurisdiction and
13 requested the court to remand the action to state court. Nilsen
14 also asserted that the trustee's motion to dismiss should be
15 converted to a motion for summary judgment because it attached
16 Nilsen's September 4th Letter and the trustee's Rebuttal Letter,
17 which were referenced in Nilsen's first amended complaint but
18 not physically attached. Lastly, Nilsen requested the court to

19
20 ⁷(...continued)
21 title 11 or arising in a case under title 11, with
22 respect to which an action could not have been
23 commenced in a court of the United States absent
24 jurisdiction under this section, the district court
shall abstain from hearing such proceeding if an
action is commenced, and can be timely adjudicated, in
a State forum of appropriate jurisdiction.

25 ⁸ Fed. R. Civ. P. 12(b)(6), incorporated by, Fed. R. Bankr.
26 P. 7012, provides that a party may present by motion a defense
27 to a claim for relief in any pleading "for failure to state a
claim upon which relief can be granted."

1 grant him permission to file the first amended complaint that he
2 had previously filed in state court.

3 The bankruptcy court granted the trustee's motion to
4 dismiss by order entered on January 30, 2009. The court
5 determined that Nilsen's defamation action was a core proceeding
6 because the trustee's postpetition statements were made while
7 performing his statutory duties. On this basis, and noting that
8 Nilsen provided no grounds for a discretionary remand, the court
9 denied Nilsen's request for remand to state court. The court
10 held that the doctrine of absolute quasi-judicial immunity did
11 not protect the trustee from Nilsen's allegations of libel and
12 slander, but concluded that California's litigation privilege
13 did.

14 On February 27, 2009 Nilsen filed his notice of appeal and
15 a motion to extend the time to appeal. The bankruptcy court
16 granted his motion by order entered on May 18, 2009 thereby
17 making his notice filed on February 27, 2009 timely.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction over this core
20 proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2).⁹ We
21 have jurisdiction under 28 U.S.C. § 158.
22
23
24
25

26 ⁹ The bankruptcy court's jurisdiction is more fully
27 discussed in Section V below.

1 **III. ISSUES¹⁰**

2 Whether the bankruptcy court erred

3 (a) in determining that Nilsen's postpetition state law
4 defamation action against the trustee qualified as a core
5 proceeding;

6 (b) in denying Nilsen's request to remand the adversary
7 proceeding to state court;

8 (c) in denying Nilsen's request to convert the trustee's
9 motion to dismiss to a summary judgment motion;

10 (d) in holding that the trustee was not entitled to the
11 protection of the absolute quasi-judicial immunity doctrine;¹¹

12 (e) in dismissing Nilsen's complaint under Fed. R. Civ. P.
13 12(b)(6) for failure to state a claim for relief upon which
14

15 ¹⁰ Nilsen lists several issues in his opening brief that
16 were not listed in his Statement of Issues on Appeal. Rule 8006
17 requires that the appellant, within ten days after filing the
18 notice of appeal, serve on the appellee a statement of issues to
19 be presented. The issues of whether the trustee improperly
20 removed Nilsen's state law lawsuit or whether the trustee waived
21 his right to removal were not in Nilsen's Statement of Issues on
22 Appeal. Accordingly, those issues are waived. Woods v. Pine
23 Mountain, Ltd. (In re Pine Mountain, Ltd.), 80 B.R. 171, 173
24 (9th Cir. BAP 1987). Nilsen also raises a new issue in his
25 reply brief regarding the court's bias against him and attaches
26 the court's order denying his motion to disqualify entered on
27 May 12, 2009. Debtor did not appeal that order which became
28 final, and we do not have jurisdiction to review it. Wiersma v.
Bank of the West (In re Wiersma), 483 F.3d 933, 938 (9th Cir.
2007) ("[T]he failure to timely file a notice of appeal is a
jurisdictional defect barring appellate review.").

¹¹ The trustee raised this issue in the bankruptcy court,
and the court decided it against him. The trustee places the
issue squarely before us now as an additional ground to affirm
the bankruptcy court.

1 relief could be granted because California's litigation
2 privilege completely protected the trustee; and

3 (f) in denying Nilsen's request for leave to amend the
4 complaint.

5 IV. STANDARDS OF REVIEW

6 The existence of jurisdiction is a question of law that we
7 review de novo. Bethlahmy v. Kuhlman (In re ACI-HDT Supply
8 Co.), 205 B.R. 231, 234 (9th Cir. BAP 1997). We review the
9 bankruptcy court's decision not to remand on an equitable basis
10 for an abuse of discretion. Id.

11 We review the bankruptcy court's dismissal of an action
12 under Fed. R. Civ. P. 12(b)(6) de novo. Biltmore Assocs., LLC
13 v. Twin City Fire Ins. Co., 572 F.3d 663, 668 (9th Cir. 2009).
14 Since we take all allegations of material fact in the complaint
15 as true for purposes of a motion to dismiss, we review the
16 bankruptcy court's decision to deny a grant of immunity to the
17 bankruptcy trustee de novo. New Alaska Dev. Corp. v. Guetschow,
18 869 F.2d 1298, 1300 (9th Cir. 1989). Likewise, the
19 applicability of California's litigation privilege is a question
20 of law which we review de novo. Am. Products Co. v. Law Offices
21 of Geller, Stewart & Foley, LLP, 134 Cal. App. 4th 1332, 1343
22 (Cal. Ct. App. 2005).

23 We review the bankruptcy court's denial of leave to amend a
24 complaint under the abuse of discretion standard. Westlands
25 Water Dist. v. Firebaugh Canal, 10 F.3d 667, 677 (9th Cir.
26 1993).

1 On appeal we may affirm the bankruptcy court on any ground
2 supported by the record, even if it differs from the bankruptcy
3 court's stated rationale. Pollard v. White, 119 F.3d 1430, 1433
4 (9th Cir. 1997).

5 V. DISCUSSION

6 Nilsen raises issues in this appeal regarding the
7 bankruptcy court's jurisdiction to hear the removed action and
8 whether the trustee has a complete defense to Nilsen's action
9 based on immunity principles and the California litigation
10 privilege. We liberally construe Nilsen's pleadings due to his
11 pro se status. Kashani v. Fulton (In re Kashani), 190 B.R. 875,
12 883 (9th Cir. BAP 1995). Before we proceed with our analysis,
13 we observe that the common thread running between the court's
14 jurisdiction, immunity principles and California's litigation
15 privilege is that these issues must be determined in relation to
16 the chapter 11 trustee's duties in a chapter 11 case. Thus,
17 because the trustee's duties provide a framework for evaluating
18 Nilsen's assertions, we briefly summarize them.

19 The trustee's role in a chapter 11 case is statutorily
20 based. Foremost, the chapter 11 trustee is the representative
21 of the estate. § 323(a). As such, the trustee is charged with
22 various duties listed in § 1106(a), which incorporates some
23 subsections of § 704. Under § 704, the trustee is held
24 accountable for the estate, investigates the debtor's financial
25 affairs, and furnishes information concerning the estate and its
26 administration to parties-in-interest. § 704(2), (4) and (7).

1 Relevant to this appeal is that the chapter 11 trustee is
2 charged with important investigative and reporting functions
3 under § 1106(a)(3) and (4).¹² In this regard, the trustee
4 investigates "the acts, conduct, assets, liabilities and
5 financial condition of the debtor" along with the operation of
6 the debtor's business and the desirability of its continuance.
7 § 1106(a)(3). The chapter 11 trustee is required to report on
8 his investigation "including any fact ascertained pertaining to
9 fraud, dishonesty, incompetence, misconduct, mismanagement, or
10 irregularity in the management of the affairs of the debtor, or
11 to a cause of action available to the estate." § 1106(a)(4).

12
13 ¹² Section 1106(a) provides that a trustee shall -

14

15 (3) except to the extent that the court orders
16 otherwise, investigate the acts, conduct, assets,
17 liabilities, and financial condition of the debtor,
18 the operation of the debtor's business and the
19 desirability of the continuance of such business, and
any other matter relevant to the case or to the
formulation of a plan; [and]

20 (4) as soon as practicable - (A) file a statement of
21 any investigation conducted under paragraph (3) of
22 this subsection, including any fact ascertained
23 pertaining to fraud, dishonesty, incompetence,
24 misconduct, mismanagement, or irregularity in the
25 management of the affairs of the debtor, or to a cause
26 of action available to the estate; and (B) transmit a
copy or a summary of any such statement to any
creditors' committee or equity security holders'
committee, to any indenture trustee, and to such other
entity as the court designates.

27

1 It is not surprising that debtors-in-possession are not charged
2 with these later mentioned investigative and reporting duties
3 because they require impartiality for the protection of
4 creditors and the estate. § 1107(a) (stating that the debtor-
5 in-possession shall perform all the functions and duties of a
6 trustee except for those specified in § 1106(a) (3) and (4)).

7 Taken together, the chapter 11 trustee's duties demonstrate
8 that he performs many "legal, adjudicative, clerical, financial,
9 administrative, and business functions" Castillo, 297
10 F.3d at 950-51. Essential to sorting out the trustee's
11 multifaceted duties for purposes of the immunity doctrine is an
12 understanding that the primary goals of a chapter 11 case are
13 the preservation of the business as a going concern and the
14 maximization of the assets recoverable to satisfy claims. See
15 Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St.
16 P'ship, 526 U.S. 434, 453 (1999). With this background, we now
17 address the issues brought by Nilsen on appeal.

18 **A. The Bankruptcy Court Had Core Jurisdiction Over Nilsen's**
19 **Defamation Action**

20 Nilsen's main contention on appeal is that the bankruptcy
21 court lacked subject matter jurisdiction to dismiss or rule on
22 any matters concerning his removed defamation action against the
23 trustee. Nilsen asserts that the trustee's statements were
24 outside the scope of the trustee's duties; that they were
25 neither judicial nor pursuant to court order; that his
26 defamation claim is a personal injury tort which is excluded
27

1 from the bankruptcy court's core jurisdiction under 28 U.S.C.
2 § 157(b) (2) (O)¹³; and that 28 U.S.C. § 157(b) (5) prevented the
3 bankruptcy court from ruling on the trustee's motion because
4 personal injury tort claims "shall be tried in the district
5 court."¹⁴ We discuss each contention below.

6 The bankruptcy court's jurisdiction is statutory. Under 28
7 U.S.C. § 1334(b), the district courts have original, but not
8 exclusive jurisdiction, of all civil proceedings arising under
9 title 11, or arising in or related to cases under title 11. The
10 district courts may, in turn, refer "any or all proceedings
11 arising under title 11 or arising in or related to a case under
12 title 11 . . . to the bankruptcy judges for the district." 28
13 U.S.C. § 157(a).

14 The distinction between "arising under", "arising in" and
15 "related to" jurisdiction can sometimes be obscure, but that is
16 not the case in this appeal. Core proceedings are those

17
18 ¹³ 28 U.S.C. § 157(b) (2) (O) states that core proceedings
include, but are not limited to -

19
20 other proceedings affecting the liquidation of the
21 assets of the estate or the adjustment of the
22 debtor-creditor or the equity security holder
relationship, except personal injury tort or wrongful
death claims[.]

23 ¹⁴ 28 U.S.C. § 157(b) (5) states in relevant part:

24 The district court shall order that personal injury
25 tort . . . claims shall be tried in the district court
26 in which the bankruptcy case is pending, or in the
27 district court in the district in which the claim
arose, as determined by the district court in which
the bankruptcy case is pending.

1 "arising under" Title 11 or "arising in" cases under Title 11.
2 The former involve a claim for relief created or determined by a
3 statutory provision of Title 11 while the latter are
4 administrative type matters that arise only in bankruptcy cases.
5 Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d 1431,
6 1435 (9th Cir. 1995).

7 Bankruptcy courts also have jurisdiction over proceedings
8 which are non-core as long as they are "related to" a bankruptcy
9 case. The bankruptcy court appropriately exercises its "related
10 to" jurisdiction when "the outcome of the proceeding could
11 conceivably have any effect on the estate being administered in
12 bankruptcy." Montana v. Goldin (In re Pegasus Gold Corp.), 394
13 F.3d 1189, 1193 (9th Cir. 2005) (citation omitted). The
14 standard formulation is that an action is "related to"
15 bankruptcy if it "in any way impacts upon the handling and
16 administration of the bankrupt estate." Id. (citation omitted).

17 Based on our review of the record and considering the
18 trustee's duties, we have little difficulty in concluding that
19 Nilsen's state court action against the trustee was a core
20 proceeding over which the bankruptcy court had subject matter
21 jurisdiction. 28 U.S.C. § 157(b); In re Harris Pine Mills, 44
22 F.3d at 1438 (plaintiff's postpetition state law claims asserted
23 against the bankruptcy trustee for conduct inextricably
24 intertwined with the trustee's sale of property of the
25 bankruptcy estate involved a core proceeding). As the
26 bankruptcy court acknowledged, Nilsen's defamation claim was

1 arisen but for his role as chapter 11 trustee in CFI's
2 bankruptcy case. Under these circumstances, we conclude that
3 Nilsen's postpetition state court action against the trustee,
4 which was based solely on the trustee's statements made during
5 the administration of CFI's bankruptcy, was a core proceeding.

6 We reject Nilsen's argument that his defamation claim is a
7 personal injury tort excluded from the bankruptcy court's core
8 jurisdiction under 28 U.S.C. § 157(b)(2)(O). Even assuming
9 defamation is a personal injury tort under California law, as
10 stated earlier, Nilsen's claim arose while the trustee was
11 performing his duties in connection with the administration of
12 CFI's estate. This makes the matter core under 28 U.S.C.
13 § 157(b)(2)(A), and subsection (O) is not implicated. See
14 Harris Pine Mills, 44 F.3d at 1437.¹⁵

15 We also are unpersuaded by Nilsen's argument that the
16 bankruptcy court lacked jurisdiction over his complaint due to
17 the statutory constraint under 28 U.S.C. § 157(b)(5) that
18 personal injury claims shall be tried by the district court. In
19 this Circuit, bankruptcy courts are not divested of pre-trial
20 jurisdiction over matters which they ultimately may be unable to
21 decide. Sigma Micro Corp. v. Healthcentral.com (In re
22 Healthcentral.com), 504 F.3d 775, 787 (9th Cir. 2007).

23 To illustrate, the Ninth Circuit in Healthcentral.com held
24

25 ¹⁵ 28 U.S.C. § 157(b)(2)(O) also excludes only those tort
26 claims which affect the liquidation of the estate or the
27 adjustment of the debtor-creditor relationship. Nilsen's action
28 against the trustee is not such a tort claim.

1 that the bankruptcy court is permitted to retain jurisdiction
2 over pre-trial matters in an action where a party was entitled
3 to a Seventh Amendment jury trial right in the district court.
4 The court explained that a bankruptcy court's pre-trial
5 management, which could include ruling on a motion to dismiss,
6 would not affect a party's right to a jury trial because "these
7 motions merely address whether trial is necessary at all." Id.,
8 citing City Fire Equip. Co. v. Ansul Fire Prot. Wormald U.S.,
9 Inc., 125 B.R. 645, 649 (N.D. Ala. 1989) ("While motions to
10 dismiss . . . may be dispositive, they do not impact on the
11 right to a jury trial. They merely involve legal issues as to
12 whether any trial is necessary. . . . The granting of such
13 motions does not deprive a party of a right to a jury trial.").

14 The reason for this rule is grounded in principles of
15 judicial efficiency and economy. The Ninth Circuit recognized
16 that, since bankruptcy courts have the power to hear Title 11
17 cases and enter relevant orders in most cases, it therefore only
18 makes sense to use the bankruptcy court's unique knowledge of
19 Title 11 and familiarity with the actions of the parties for
20 pre-trial matters. Id., 504 F.3d at 787-88. Consistent with
21 Healthcentral.com, we hold that any statutory constraint on the
22 court's jurisdiction under 28 U.S.C. § 157(b)(5) does not extend
23 to pre-trial matters. Here, the bankruptcy court ordered the
24 appointment of a trustee and was familiar with CFI's bankruptcy
25 proceeding and the parties' actions before it. Nilsen did not
26 assert that the bankruptcy court's ruling on the trustee's

1 motion to dismiss, although dispositive, deprived him of any
2 rights. Moreover, we can identify no deprivation of rights
3 under these circumstances.

4 We mention in passing that even assuming Nilsen's
5 defamation claim was non-core, the bankruptcy court could still
6 properly exercise its "related to" jurisdiction over his claim
7 because it undoubtedly would impact the trustee's handling and
8 administration of CFI's estate. In re Pegasus Gold Corp., 394
9 F.3d at 1193.

10 The bankruptcy court also found that Nilsen's "informal
11 request" to withdraw the reference was not properly before the
12 court. We agree because Nilsen did not file a motion to
13 withdraw the reference as required under 28 U.S.C. § 157(d)
14 (district court may withdraw any case or proceeding upon timely
15 motion of any party.) We finally observe that to the extent
16 Nilsen argues that mandatory abstention was required, the
17 abstention requirements under 28 U.S.C. § 1334(c)(1) or (2) are
18 inapplicable to removed proceedings, since a successful removal
19 effectively extinguishes the parallel proceeding in state court.
20 Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1010 (9th
21 Cir. 1997).

22 For all these reasons, the court properly exercised its
23 "arising in" core jurisdiction over Nilsen's defamation claim.

24 **B. The Bankruptcy Court Did Not Err In Denying Nilsen's**
25 **Request For Remand**

26 That the matter is core does not preclude a discretionary
27

1 remand, as provided for by 28 U.S.C. § 1452(b).¹⁶ The statute
2 gives the bankruptcy court a broad grant of authority to remand
3 a previously removed claim for relief "on any equitable
4 ground".¹⁷ Courts may consider up to fourteen factors under this
5 provision.¹⁸ Citigroup, Inc. v. Pac. Inv. Mgmt. Co. (In re Enron

7 ¹⁶ 28 U.S.C. § 1452(b) states in relevant part: "The
8 court to which such claim or cause of action is removed may
9 remand such claim or cause of action on any equitable ground."

10 ¹⁷ The bankruptcy court's decision to remand under 28
11 U.S.C. § 1452(b) "can be reviewed only by a district court or a
12 bankruptcy appellate panel, and not by a court of appeals or by
13 the Supreme Court." McCarthy v. Prince (In re McCarthy), 230
14 B.R. 414, 417 (9th Cir. BAP 1999), citing Things Remembered,
15 Inc. v. Petrarca, 516 U.S. 124 (1995).

16 ¹⁸ The factors are:

17 (1) the effect or lack thereof on the efficient
18 administration of the estate if the Court recommends
19 [remand or] abstention; (2) extent to which state law
20 issues predominate over bankruptcy issues; (3)
21 difficult or unsettled nature of applicable law; (4)
22 presence of related proceeding commenced in state
23 court or other nonbankruptcy proceeding; (5)
24 jurisdictional basis, if any, other than § 1334; (6)
25 degree of relatedness or remoteness of proceeding to
26 main bankruptcy case; (7) the substance rather than
27 the form of an asserted core proceeding; (8) the
28 feasibility of severing state law claims from core
bankruptcy matters to allow judgments to be entered in
state court with enforcement left to the bankruptcy
court; (9) the burden on the bankruptcy court's
docket; (10) the likelihood that the commencement of
the proceeding in bankruptcy court involves forum
shopping by one of the parties; (11) the existence of
a right to a jury trial; (12) the presence in the
proceeding of nondebtor parties; (13) comity; and (14)
the possibility of prejudice to other parties in the
action.

1 Corp.), 296 B.R. 505, 508 n.2 (C.D. Cal. 2003).

2 We discern no grounds for the court to exercise
3 discretionary remand in this record. In fact, that the matter
4 is core is a significant factor weighing in favor of
5 adjudicating the dispute in the bankruptcy court. We conclude
6 that the court did not abuse its discretion in denying Nilsen's
7 request for remand.

8 **C. The Bankruptcy Court Did Not Err In Granting the Trustee's**
9 **Motion to Dismiss Under Fed. R. Civ. P. 12(b) (6)**

10 As a further preliminary matter, we address Nilsen's
11 argument that the court erred by not converting the trustee's
12 motion to dismiss to a motion for summary judgment. Nilsen
13 argues that the declaration of the trustee's counsel, submitted
14 in support of the trustee's motion to dismiss, contained
15 information "outside the pleadings". Those "outside pleadings"
16 documents were full copies of two letters whose contents Nilsen
17 referenced in his first amended complaint, but which were not
18 physically attached to it.

19 The general rule is that if a document outside the
20 pleadings is considered on a motion to dismiss, the motion shall
21 be treated as one for summary judgment. Fed. Rule Civ. P.
22 12(d).¹⁹ The incorporation by reference doctrine is an exception

24 ¹⁹ Fed. R. Civ. P. 12(d), incorporated by, Rule 7012
25 provides in relevant part:

26 If, on a motion under Rule 12(b) (6) . . . , matters
27 outside the pleadings are presented to and not
28 (continued...)

1 to the conversion rule. This doctrine allows the court to
2 consider documents on judicial notice which are referenced in
3 but not physically attached to the complaint, so long as they
4 are essential to the plaintiff's claim and not subject to
5 authenticity challenges. Janas v. McCracken (In re Silicon
6 Graphics, Inc. Sec. Lit.), 183 F.3d 970, 986 (9th Cir. 1999). A
7 court's consideration of documents under the incorporation by
8 reference doctrine does not transform the matter into a motion
9 for summary judgment.

10 On this basis, the bankruptcy court took notice of the
11 letters which were referenced in Nilsen's first amended
12 complaint. The record does not indicate that Nilsen ever
13 questioned the authenticity of either letter submitted by the
14 trustee. We conclude that the court properly considered the
15 letters. Converting the trustee's motion to one for summary
16 judgment was unnecessary.

17 We will affirm the bankruptcy court's order to dismiss
18 Nilsen's complaint if it appears beyond doubt that he can prove
19 no set of facts in support of his claim that would entitle him
20 to relief. Educational Credit Mgmt. Corp. v. McBurney (In re
21 McBurney), 357 B.R. 536, 539 (9th Cir. BAP 2006). We accept as
22 true all factual allegations in the complaint and construe those
23 facts in the light most favorable to Nilsen. Id. If we are
24 satisfied that the deficiencies in the complaint could not

25
26 ¹⁹(...continued)
27 excluded by the court, the motion must be treated as
one for summary judgment

1 possibly be cured by amendment, dismissal without leave to amend
2 is appropriate. Dumas v. Kipp, 90 F.3d 386, 389 (9th Cir.
3 1996).

4 We now reach the heart of this dispute: whether the
5 trustee has absolute immunity under federal bankruptcy law and
6 California's litigation privilege. We tackle the immunity
7 question first.

8 **1. Quasi-Judicial Immunity**

9 The bankruptcy court found that quasi-judicial immunity did
10 not shield the trustee from Nilsen's allegations of slander and
11 libel. The trustee argues that the immunity doctrine provides
12 an additional ground for us to affirm the bankruptcy court's
13 order. The trustee "bears the burden of establishing that such
14 immunity is justified." Castillo, 297 F.3d at 947.

15 Judges historically have been granted absolute immunity
16 from suits for their judicial acts. Forrester v. White, 484
17 U.S. 219, 225-28 (1988). An offshoot of judicial immunity is
18 the doctrine of quasi-judicial immunity which extends immunity
19 to nonjudicial officers for "all claims relating to the exercise
20 of judicial functions." Castillo, 297 F.3d at 947 (citation
21 omitted).

22 In Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993),
23 the United States Supreme Court set forth a two-part test for
24 determining whether a non-judicial officer is entitled to quasi-
25 judicial immunity. The first inquiry requires the court to
26 inquire thoroughly into the immunity historically accorded the

1 relevant official at common law and the public interest behind
2 it. Id. at 432. The Ninth Circuit in Castillo has already
3 conducted this inquiry, concluding that bankruptcy trustees and
4 their predecessor counterparts historically have been afforded
5 absolute quasi-judicial immunity because they perform some
6 functions which are judicial in nature. Id. at 950; Mullis v.
7 United States Bankr. Court, 828 F.2d 1385, 1390 (9th Cir. 1987),
8 cert. denied, 486 U.S. 1040 (1988) (citing Lonneker Farms, Inc.
9 v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986)). Based on
10 Castillo, the trustee may assert a quasi-judicial immunity
11 defense.

12 The second inquiry requires us to examine whether immunity
13 covers the trustee's functions at issue. We decide questions
14 regarding a trustee's immunity under this inquiry on a case-by-
15 case basis because not all "of the [t]rustee's many functions
16 are covered by absolute quasi-judicial immunity." Castillo, 297
17 F.3d at 953. The rule is that a trustee may be "immune for
18 actions that are functionally comparable to those of judges,
19 i.e., those functions that involve discretionary judgment." Id.
20 at 947, citing Antoine, 508 U.S. at 436.

21 In determining whether a particular function is judicial in
22 nature, we are cautious not to construe the immunity doctrine
23 too narrowly by focusing on the underlying act. Rather, we
24 identify the "ultimate act" in determining whether a particular
25 function is judicial in nature. Id. at 952, citing Ashelman v.
26 Pope, 793 F.2d 1072, 1075-78 (9th Cir. 1986). Accordingly, we
27

1 do not focus on Nilsen's legal conclusions that the trustee
2 committed libel and slander. This focus begs the underlying
3 question of immunity by misplacing the emphasis.

4 Here, the trustee made the allegedly defamatory statements
5 while performing the following functions: he convened the
6 § 341(a) meeting; orally reported on his on-going investigation
7 regarding the conduct of prior management, including any facts
8 pertaining to fraud; and posted his Rebuttal Letter on the
9 official website for CFI's bankruptcy estate to inform the
10 creditors about the assets of the estate and protect those
11 assets from further dissipation and harm. As noted earlier, the
12 trustee's communications occurred while he was performing his
13 official statutory duties. See Mullis, 828 F.2d at 1390-91
14 (bankruptcy trustee had absolute quasi-judicial immunity from
15 damages for acts or omissions within the ambit of the trustee's
16 official duties).

17 The statutory provisions regarding the trustee's duties
18 give the trustee broad discretion and supervisory powers over
19 the administration of a chapter 11 estate. As such, we construe
20 them as inextricably intertwined with the court's functions in
21 the chapter 11 bankruptcy process, which are aimed at preserving
22 the business as a going concern and maximizing the value of
23 assets for creditors. It follows then that the trustee's
24 functions listed above were "essential to the authoritative
25 adjudication of private rights to the bankruptcy estate."
26 Castillo, 297 F.3d at 951 ("[Q]uasi-judicial immunity attaches

1 to only those functions essential to the authoritative
2 adjudication of private rights to the bankruptcy estate.”).
3 Accordingly, we determine that under these circumstances the
4 trustee is protected by the absolute quasi-judicial immunity
5 doctrine.

6 In light of our determination, we believe that the
7 bankruptcy court’s reliance on New Alaska Dev. Corp. v.
8 Guetschow, 869 F.2d 1298, 1304 (9th Cir. 1989), and Lisowski v.
9 Davis (In re Davis), 312 B.R. 681, 688 (Bankr. D. Nev. 2004),
10 was misplaced. We note that New Alaska and the case law relied
11 upon in Davis have limited precedential value because they are
12 distinguishable and outdated in light of the Supreme Court’s
13 decision in Antoine, which instructed us to conduct the two-part
14 inquiry cited above.

15 In New Alaska, the court held that a receiver was not
16 protected under the immunity doctrine for his alleged slander
17 referring to the plaintiff as “his ward”. The court’s decision
18 was based on its conclusion that the receiver’s statement was
19 “not a function” connected with his receivership duties. Here,
20 in contrast, the trustee’s alleged defamatory statements were
21 made in connection with performance of his official duties.

22 The bankruptcy court’s other cited precedent, Davis, relied
23 primarily on Bennett v. Williams, 892 F.2d 822, 823 (9th Cir.
24 1989), and the cases cited in Bennett, for its conclusion that
25 immunity did not apply to a trustee and his attorney for
26 defamation. Finding Bennett not helpful, the bankruptcy court

1 relied upon the decisions cited in Bennett as examples of
2 conduct for which the Ninth Circuit had denied trustees
3 immunity. But each of those cases involved situations where the
4 trustee was either negligent in managing the debtor's business
5 or assets or erred outside of the bankruptcy proceeding. See
6 Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967) (trustee
7 liable for wrongfully possessing real property not belonging to
8 estate); Hall v. Perry (In re Cochise College Park, Inc.), 703
9 F.2d 1339, 1357-58 (9th Cir. 1983) (trustee liable for
10 misrepresentations and acting inconsistent with conduct of an
11 ordinary prudent person serving in the capacity of a trustee);
12 Rigden v. Aldrich (In re Rigden), 795 F.2d 727, 731-33 (9th Cir.
13 1986) (trustee liable for negligence in business judgment); Nash
14 v. Kester (In re Nash), 765 F.2d 1410, 1415 (9th Cir. 1985)
15 (trustee liable for improper distribution of funds after chapter
16 13 proceeding dismissed). None of these cases is factually
17 similar to the trustee's alleged misdeeds here, which revolved
18 around communications to the creditor body which he serves.

19 Policy also has a role in our conclusions. A trustee's
20 duties to uncover and report on insider fraud or other
21 fraudulent conduct are important ones that should not be
22 compromised by the threat of litigation against a trustee.
23 Granting immunity to bankruptcy trustee's for functions which
24 are judicial in nature is based on a policy of protecting the
25 bankruptcy process.

1 3d 626 (Cal. Ct. App. 2008) (citation omitted). See also
2 Briscoe v. LaHue, 460 U.S. 325, 333 (1983) (in applying a
3 similar common law litigation privilege, the United States
4 Supreme Court said “the dictates of public policy . . .
5 require[] that the paths which lead to the ascertainment of
6 truth should be left as free and unobstructed as possible.”).
7 The California Supreme Court has held that to effectuate these
8 purposes, the litigation privilege is “absolute in nature.”
9 Silberg, 50 Cal. 3d at 215.

10 There is a four-part test that must be met for application
11 of the privilege: the communication must be “(1) made in
12 judicial or quasi-judicial proceedings; (2) by litigants or
13 other participants authorized by law; (3) to achieve the objects
14 of the litigation; and (4) that [has] some connection or logical
15 relation to the action.” Id. at 212. The Silberg court stated
16 that the third and fourth requirements are construed together;
17 “that the communication be in furtherance of the objects of the
18 litigation is, in essence, simply part of the requirement that
19 the communication be connected with, or have some logical
20 relation to, the action, i.e., that it not be extraneous to the
21 action.”²¹ Id. at 219-20. It is also noted that the third
22 requirement is not “a test of a participant’s motives, morals,
23

24 ²¹ Since the Silberg decision, a line of cases has
25 nullified the “logical relation” requirement because of this
26 statement. Sacramento Brewing Co. v. Desmond, Miller &
27 Desmond, 75 Cal. App. 4th 1082, 1086, 89 Cal. Rptr. 2d 760 (Cal.
28 Ct. App. 1999). However, Silberg has not been overruled, so we
include this requirement.

1 ethics or intent.” Id. We finally observe that the privilege
2 protects only “communicative” conduct and is broadly applied
3 with all doubts “resolved in favor of the privilege.” Lambert,
4 158 Cal. App. 4th at 1138 (citation omitted).

5 With these concepts in mind, we consider whether the
6 trustee is absolutely protected by the privilege. It is
7 undisputed that the trustee’s statements, both oral and written,
8 were communicative, so this threshold issue is met. Rusheen v.
9 Cohen, 37 Cal. 4th 1048, 1057, 39 Cal. Rptr. 3d 516 (2006). Our
10 review of the record also convinces us that each requirement
11 under the four-part test for application of the privilege has
12 been satisfied here.

13 A bankruptcy proceeding is a judicial proceeding within the
14 scope of California’s litigation privilege. See Sacramento
15 Brewing Co., 75 Cal. App. 4th at 1086 (erroneously captioned
16 notice of motion filed in a bankruptcy proceeding occurred in a
17 judicial proceeding for purposes of California litigation
18 privilege in defamation action). Therefore, the first
19 requirement is met since the trustee made the allegedly
20 defamatory statements in CFI’s bankruptcy proceeding. It makes
21 no difference that the trustee made oral statements at the
22 § 341(a) meeting of creditors or that his written statements
23 were posted on the official website of CFI’s bankruptcy estate.
24 In either case, his statements are still protected “even though
25 the publication is made outside the courtroom and no function of
26 the court or its officers is involved.” Rusheen, 37 Cal. 4th at

1 proceeding because they were made while he was performing his
2 statutory duties. The whole purpose of his statements at the
3 § 341(a) meeting was to inform the investors of the results of
4 his investigation into CFI's operations and financial condition.
5 In his Rebuttal Letter, the trustee expressed his concern that
6 the investors were being misled as to CFI's financial viability
7 by the allegedly erroneous information contained in Nilsen's
8 September 4 Letter. Not only did the trustee's statements have
9 some logical relation to the bankruptcy proceeding, they bore
10 directly on the financial condition of CFI and why it was in
11 bankruptcy. As such, the trustee's oral and written
12 communications were absolutely privileged under Cal. Civ. Code
13 § 47(b).²²

14 The bankruptcy court considered Nilsen's first amended
15 complaint which he had filed in state court (after removal) as
16 his amendment as a matter of right under Fed. R. Civ. P. 15(a).²³
17 In light of our discussion above, we conclude the deficiencies
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19
20 ²² Although Nilsen alleges that the trustee's statements
21 were not "judicial" and were "beyond the scope of the court's
22 jurisdiction" we need not accept those conclusory allegations as
23 true for purposes of a motion to dismiss. Ashcroft v. Iqbal,
129 S.Ct. 1937, 1949 (2009) (pleadings that are no more than
conclusions are not entitled to the assumption of truth).

24 ²³ Fed. R. Civ. P. 15, incorporated by, Rule 7015 provides
25 that a party may amend its pleading once as a matter of course
26 before a responsive pleading is served. Fed. R. Civ. P.
27 15(a)(1)(A). "In all other cases, a party may amend its
28 pleading only with the opposing party's written consent or the
court's leave. The court should freely give leave when justice
so requires." Fed. R. Civ. P. 15(a)(2).

1 in Nilsen's complaint could not possibly be cured by amendment.
2 Dumas, 90 F.3d at 389.

3 **VI. CONCLUSION**

4 Based on the foregoing, we agree that the bankruptcy court
5 did not err in dismissing Nilsen's complaint against the
6 trustee, without leave to amend. Accordingly, we AFFIRM.

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