

**DEC 09 2005**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	EC-05-1071-SBMa
7	GAVRILO SPAICH,	)	Bk. No.	04-24880-B11
8	Debtor.	)	Adv. No.	04-02294
9	_____	)		
10	GAVRILO SPAICH,	)		
11	Appellant,	)		
12	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
13	SUSAN K. SMITH, Trustee,	)		
14	Appellee.	)		
15	_____	)		

Argued and Submitted on  
October 20, 2005 at Sacramento, California

Filed - December 9, 2005

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

Honorable Jane Dickson McKeag, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: SMITH, BRANDT and MARLAR, Bankruptcy Judges.

\_\_\_\_\_  
<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Gavriilo Spaich ("Debtor") appeals a final judgment by the  
2 bankruptcy court, entered February 5, 2005, which denied him a  
3 discharge under § 727.<sup>2</sup> We AFFIRM.

4 **I. FACTS**

5 Debtor is the president and sole shareholder of Spaich  
6 Farms, Inc. ("Spaich Farms"). Spaich Farms filed a chapter 11  
7 bankruptcy, and Susan K. Smith ("Smith") was duly appointed the  
8 trustee. On May 12, 2004, Debtor filed his own individual  
9 chapter 11 petition, which is the subject of this appeal. Debtor  
10 did not schedule Smith, or Spaich Farms, as a creditor. On  
11 November 16, 2004, after the claims bar date had passed, Smith  
12 filed a proof of claim.<sup>3</sup>

13 On August 10, 2004, Smith initiated an adversary proceeding  
14 objecting to Debtor's discharge under §§ 727(a)(2)-(a)(7). On  
15 January 26, 2005, the day before the adversary was set to go to  
16 trial, Debtor filed an objection to the proof of claim asserting  
17 that the claim was untimely, lacked adequate documentation, and  
18 failed to specify a precise amount.

19 At trial, Debtor orally moved the court to either dismiss  
20 the complaint on the ground that the claim objection deprived  
21 Smith of standing to prosecute, or alternatively, to postpone the  
22 trial until Smith's status as a creditor could be determined.  
23 The court denied both requests, and the trial went forward.

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24  
25 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

27 <sup>3</sup> The claims bar date expired on September 16, 2004.  
28 Subsequent to the filing of this appeal, on July 7, 2005, the  
bankruptcy court deemed Smith's proof of claim to be timely.

1 Following trial, the court issued a memorandum decision  
2 which found Smith to have had standing to bring a discharge  
3 action, and on the merits, the discharge was denied. A separate  
4 judgment denying discharge was also entered into the docket.

5 Debtor appeals.

## 6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C.  
8 § 1334 and §§ 157(b)(1) and (b)(2)(J). We have jurisdiction  
9 under 28 U.S.C. § 158(c)(1).

## 10 **III. ISSUES**

- 11 1. Whether the bankruptcy court erred in finding that  
12 Smith had standing as a creditor to object to discharge  
13 under § 727.
- 14 2. Whether the bankruptcy court erred in denying a chapter  
15 11 debtor a discharge under § 727 without making  
16 findings under §§ 1141(d)(3)(A) and (B).

## 17 **IV. STANDARD OF REVIEW**

18 This appeal presents issues of law only, which we review de  
19 novo. In re Madigan, 122 B.R. 103, 105 (9th Cir. BAP 1991); In  
20 re Cole, 93 B.R. 707, 708 (9th Cir. BAP 1988).

## 21 **V. DISCUSSION**

### 22 **A. Standing**

23 In his opening brief, Debtor challenges Smith's standing to  
24 bring the § 727 action, arguing that because Smith is the trustee  
25 in the Spaich Farms bankruptcy case and is not the trustee in his  
26 personal bankruptcy, she lacked standing to object to his  
27 discharge. However, at oral argument before this panel, Debtor  
28 conceded that Smith had standing as a creditor to bring the

1 discharge action. Therefore, we find that the issue is moot.<sup>4</sup>

2 Debtor also complains that standing to object to a  
3 discharge, in general, is too broad. He argues that anyone can  
4 have standing to object to discharge by simply filing a claim, or  
5 as in this case, a late filed proof of claim. In this regard,  
6 Debtor requests that we fashion a new rule that would require the  
7 adjudication of a claim before its holder is permitted to file an  
8 action challenging a debtor's discharge. We decline to do so.

9 First, there is nothing in the Code or the Rules which  
10 suggest that only creditors with proven claims may file such an  
11 action, and case law suggests the contrary. See § 727(c)(1); See  
12 In re O'Callaghan, 304 B.R. 500, 511 (Bankr. M.D. Fla. 2003) ("the  
13 fact that a proof of claim is challenged and the claim is  
14 disputed would not detract from the status of an entity as a  
15 creditor until the claim is ultimately disallowed."). Second,  
16 and most importantly, "rule-making" is beyond our province and  
17 authority.

18 B. Judgment Denying Discharge

19 With certain limitations, an individual chapter 11 debtor  
20 receives a discharge upon confirmation of a chapter 11 plan.  
21 § 1141(d)(1). The confirmation of a plan does not, however,  
22 discharge a debtor if

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23  
24 <sup>4</sup> Debtor also contends in his brief that an unscheduled  
25 creditor who files a late proof of claim lacks standing to bring  
26 a § 727 action. We need not address this issue since, according  
27 to the docket, the bankruptcy court has entered an order deeming  
28 Smith's claim to be timely. Moreover, even if that order were  
before us - which it is not - the complaint objecting to  
discharge, filed prior to the expiration of the bar date, would  
likely qualify as a timely filed "informal claim." See In re  
Hayes, 327 B.R. 453, 461-62 (Bankr. C.D. Cal. 2005).

1 (A) the plan provides for the liquidation of  
2 all or substantially all of the property of  
the estate;

3 (B) the debtor does not engage in business  
4 after consummation of the plan; and

5 (C) the debtor would be denied a discharge  
6 under section 727(a) of this title if the  
case were a case under chapter 7 of this  
title.

7 § 1141(d) (3) (emphasis added).

8 The three subparts of § 1141(d) (3) are written in the  
9 conjunctive, meaning that an individual chapter 11 debtor will  
10 only be denied a discharge if, in addition to the existence of  
11 grounds for denial of discharge under § 727(a), the confirmed  
12 plan is a liquidating one and the debtor does not engage in  
13 business after the plan has been consummated. In re Williams,  
14 227 B.R. 589, 593 (D.R.I. 1998).

15 According to Debtor, the complaint should have included  
16 allegations under §§ 1141(d) (3) (A) and (B) and the absence of  
17 such allegations, as well as any supporting evidence at trial,  
18 deprived the court of authority to enter the judgment denying  
19 discharge.

20 Debtor's position is not supported by either § 1141(d) (3) or  
21 Rule 4004(a). Rule 4004(a), which establishes the procedure for  
22 the filing of § 727 complaints objecting to discharge, provides

23 In a chapter 7 liquidation case **a complaint**  
24 **objecting to the debtor's discharge under**  
25 **§ 727(a)** of the Code shall be filed no later  
than 60 days after the first date set for the  
26 meeting of creditors under § 341(a). In a  
chapter 11 reorganization case, **the complaint**  
27 shall be filed no later than the first date  
set for the hearing on confirmation.

28 Fed. R. Bank. P. 4004(a) (emphasis added).

1 To rephrase Rule 4004(a), in a chapter 7 case, a complaint  
2 objecting to discharge under § 727(a) must be filed not more than  
3 60 days after the § 341(a) meeting of creditors, but in a chapter  
4 11 case, such a complaint (under § 727(a)) must be filed by the  
5 first date set for confirmation of the chapter 11 plan. Though  
6 Rule 4004(a) clearly governs the filing of § 727 complaints in  
7 chapter 11 cases, it makes no reference to § 1141(d)(3). This  
8 makes sense because the denial of a chapter 11 debtor's discharge  
9 under 1141(d)(3) only comes into play upon confirmation of a  
10 plan. Yet, as indicated above, under Rule 4004(a), the § 727  
11 complaint must be filed before plan confirmation. Thus, while a  
12 creditor seeking denial of a chapter 11 debtor's discharge must  
13 obtain findings warranting denial under § 727(a), the creditor  
14 need not plead allegations under § 1141(d)(3)(A) and (B) in the  
15 § 727(a) complaint; findings regarding the latter may be sought  
16 as part of the plan confirmation process.

17 There is no dispute that the bankruptcy court made findings  
18 under § 727(a) (in satisfaction of § 1141(d)(3)(C)) in the  
19 adversary proceeding, but made no findings regarding the nature  
20 of a confirmed chapter 11 plan,<sup>5</sup> or Debtor's future business  
21 plans (in satisfaction of §§ 1141(d)(3)(A) and (B),  
22 respectively). Further, Debtor is correct that § 727(a) findings  
23 alone are insufficient to deny his discharge under § 1141(d)(3).  
24 Smith concedes this point. If this were the end of the story,  
25 remand to the bankruptcy court for additional findings under  
26 §§ 1141(d)(3)(A) and (B) would be appropriate. However, this is

27 <sup>5</sup> As of the time of the trial, Debtor had filed a disclosure  
28 statement and a chapter 11 plan, but had not obtained approval or  
confirmation of either.

1 not the case.

2 After entry of the § 727 judgment, and after the  
3 commencement of this appeal, the court entered an order  
4 confirming the chapter 11 trustee's liquidating plan. In this  
5 regard, the court made the following specific findings under  
6 § 1141(d) (3):

7 Pursuant to 11 U.S.C. § 1141, confirmation of  
8 the Plan does not discharge Debtor because:

9 a. The Plan is a liquidating plan;

10 b. The Debtor is not continuing in business  
as defined in 11 U.S.C. § 1141(d) (3) (B);

11 c. The Debtor would be denied a discharge  
12 under section 727(a) of the Bankruptcy Code  
if the case were a case under Chapter 7 of  
13 the Bankruptcy Code.

14 See Findings of Fact and Conclusions of Law in Support of Order  
15 Confirming Trustee's First Amended Plan of Reorganization.<sup>6</sup>

## 16 VI. CONCLUSION

17 To the extent that the entry of the judgment denying  
18 discharge was premature due to the absence of findings under  
19 §§ 1141(d) (3) (A) and (B), that infirmity has been adequately  
20 cured by the subsequent findings noted above. It would be an  
21 exercise in futility to remand the matter back to the bankruptcy  
22 court to make findings that have already been made. Therefore,  
23 we AFFIRM with instructions that the court enter an amended  
24 judgment denying discharge under § 1141(d) (3).

25  
26  
27  
28 <sup>6</sup> The order confirming the trustee's plan was not submitted  
as part of the record.