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NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. EC-11-1719-MkJu
2)
3 WALTER R. PINEDA,) Bk. No. 10-91936
4)
5 Debtor.) Adv. No. 10-09060
6)
7)
8)
9 WALTER R. PINEDA,)
10)
11 Appellant,)
12)
13 v.) **MEMORANDUM***
14)
15 BANK OF AMERICA, N.A.;)
16 RECONTRUST COMPANY, N.A.; BANK)
17 OF NEW YORK MELLON, N.A.,)
18 INC.; GSR MORTGAGE LOAN TRUST)
19 2003-9; GOLDMAN SACHS, INC.;)
20 UNITED STATES TRUSTEE; GARY)
21 FARRAR, Chapter 7 Trustee,)
22)
23 Appellees.)
24)
25)
26)

Argued and Submitted on March 22, 2013
at Sacramento, California

Filed - April 23, 2013

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

Honorable Ronald H. Sargis, Bankruptcy Judge, Presiding

22 Appearances: Appellant Walter R. Pineda argued on his own
23 behalf; Andrea McDonald Hicks of Bryan Cave, LLP
24 argued for Appellees Bank of America, N.A.,
25 Recontrust Company, N.A., Bank of New York Mellon,
26 N.A., Inc., Goldman Sachs, Inc. and GSR Mortgage
27 Loan Trust 2003-9.

27 *This disposition is not appropriate for publication.
28 Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

2 **INTRODUCTION**

3 Chapter 7¹ debtor Walter R. Pineda ("Pineda") commenced an
4 adversary proceeding ("Adversary Proceeding") against Bank of
5 America and others regarding the origination and securitization
6 of his home loan ("Loan") and regarding enforcement of that Loan,
7 particularly the commencement of foreclosure proceedings. The
8 bankruptcy court dismissed Pineda's first amended complaint
9 ("FAC") without prejudice and with leave to amend ("First
10 Dismissal Order"). After Pineda filed a second amended complaint
11 ("SAC"), the bankruptcy court dismissed the entire adversary
12 proceeding without prejudice and without leave to amend, but
13 subject to a final decision on whether the court should abstain
14 under 28 U.S.C. § 1334(c)(1) ("Second Dismissal Order"). Pineda
15 appealed that ruling. Later, the bankruptcy court entered an
16 abstention order ("Abstention Order"), which fully and finally
17 disposed of the Adversary Proceeding. Pineda did not file a
18 notice of appeal after entry of the Abstention Order, but he did
19 file a motion for leave to appeal.

20 It is debatable whether Pineda took any action that should
21 count as an appeal of the Abstention Order. If there was no
22 timely appeal of the Abstention Order, Pineda's appeal of the
23 Second Dismissal Order should be dismissed as moot. We will,
24 however, err on the side of determining this matter on the

25 _____
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 merits, so we will treat Pineda's motion for leave to appeal as
2 if it were a notice of appeal from the Abstention Order. We
3 AFFIRM the bankruptcy court's Abstention Order. Because we are
4 affirming the Abstention Order and because both of the bankruptcy
5 court's dismissal orders were without prejudice, we do not reach
6 any substantive issues related to the dismissal orders.

7 **FACTS²**

8 **A. The Loan and Pineda's Bankruptcy Case**

9 Pineda admits that, on or about August 13, 2002, in exchange
10 for the Loan, he executed a promissory note ("Note") and a deed
11 of trust ("Trust Deed") against his residence located in Sonora,
12 California ("Property"). Pineda does not dispute that he stopped
13 making payments on the Loan in 2008, or that foreclosure
14 proceedings were commenced against the Property in January 2010,
15 with the recording of a Notice of Default.

16 Pineda attributes his financial condition to a combination
17 of factors including acute health problems, which at times have
18 required hospitalization, and the national financial crisis,
19 which he in part blames on the defendants named in the Adversary
20 Proceeding.

21 Apparently in response to a scheduled foreclosure sale of
22 the Property, Pineda filed his chapter 7 bankruptcy case in May
23 2010. Gary Farrar was appointed to serve as chapter 7 trustee
24 ("Trustee"). On his Schedule C, property claimed as exempt,
25

26 ²We have derived most of the facts recited herein from the
27 allegations of Pineda's complaints and from the procedural
28 history of Pineda's Adversary Proceeding, which is not subject to
legitimate dispute.

1 Pineda listed as an asset "Preparation of civil complaint against
2 Bank of America et al for fraud, breach of contract, violations
3 of truth In Lending Act." He did not list these claims on his
4 Schedule B of personal property, but his Statement of Financial
5 Affairs listed a pending lawsuit ("State Court Lawsuit") he and
6 his wife had filed in Tuolumne County Superior Court against Bank
7 of America and ReconTrust to enjoin foreclosure, for declaratory
8 relief and for an accounting (case no. CV 55686).

9 In August 2010, the Trustee filed his final report
10 reflecting that there were no non-exempt assets of any value for
11 him to administer, liquidate or distribute. Later that same
12 year, in November 2010, Pineda filed an Amended Schedule B of
13 personal property which contained the following entry: "Civil
14 Lawsuit Against Bank of America, Goldman Sachs, Bank of New York
15 Mellon - Estimated value 1 - 10 million dollars." He also listed
16 this same asset on his Amended Schedule C, but he did not list
17 there any exemption value or any asset value. Pineda never filed
18 proof of service reflecting any service of notice of his amended
19 schedules, but his form notice of amended schedules contained his
20 signed certification stating that he had given notice of the
21 filing of his schedule amendments to the Trustee and all other
22 interested parties.

23 The Trustee never amended his final report. Nor did he
24 take any action related to the claims against Bank of America and
25 others until July 2011, when he signed off on a document entitled
26 "Stipulation to Abandon" ("Stipulation To Abandon") which Pineda
27 apparently prepared. Among other things, the Trustee stated in
28 the Stipulation To Abandon that he was authorizing Pineda to

1 prosecute all of the claims alleged in the Adversary Proceeding
2 and also that he was abandoning all rights that were the subject
3 of the Adversary Proceeding. After the Trustee signed off on the
4 Stipulation To Abandon, Pineda filed it in the Adversary
5 Proceeding.

6 **B. Pineda's Adversary Proceeding**

7 Meanwhile, Pineda commenced the Adversary Proceeding in
8 August 2010. Over the next year, he went through three versions
9 of his complaint. The first one, filed when he commenced the
10 Adversary Proceeding, contained the following three claims for
11 relief: (1) for violation of the Federal Fair Debt Collection
12 Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified
13 at 15 U.S.C. §§ 1692, et seq.) ("Fed. FDCPA"); (2) for a
14 determination of the validity of Bank of America's claimed lien
15 against the Property; and (3) for fraud. Pineda conceded in his
16 original complaint that he owed an obligation to someone on
17 account of the Loan, but he asserted that, as a result of the
18 securitization of his Loan and/or because of certain payments
19 defendants allegedly received from the Troubled Asset Relief
20 Program, or "TARP," none of the defendants continued to have any
21 right or entitlement to enforce the Note or the Trust Deed.

22 **C. Pineda's FAC**

23 Pursuant to stipulations between the parties filed in
24 December 2010 and January 2011, Pineda filed his FAC in February
25 2011.³ The FAC greatly elaborated on the defendants' alleged

26
27 ³The December 2010 stipulation further provided that,
28 because the State Court Lawsuit essentially concerned the same
(continued...)

1 misconduct.⁴ The FAC contains only four claims for relief, for
2 fraud, breach of contract, unjust enrichment and declaratory
3 relief. But within each claim for relief Pineda alleged that the
4 defendants violated a host of California and federal (non-
5 bankruptcy) laws.⁵ These violations allegedly occurred as a part
6 of the following activities: (1) when Bank of America originated
7 the loan; (2) when Bank of America or its wholly-owned subsidiary
8 Bank of America Corp. LP (jointly, "BOA") collected Pineda's Loan
9 payments; (3) when BOA purported to sell the Loan to Goldman
10 Sachs, Inc. and/or defendant Goldman Sachs Mortgage Securities
11 Corp. (jointly, "Goldman Sachs"); (4) when Goldman Sachs paid BOA
12 for originating and purporting to sell the Loan; (5) when Goldman
13

14 ³(...continued)

15 subject matter as the Adversary Proceeding, the parties agreed to
16 dismiss the State Court Lawsuit without prejudice. The
17 bankruptcy court's December 24, 2010 order based on the December
18 2010 stipulation did not address this aspect of the parties'
19 stipulation. That order merely set deadlines for filing the FAC
20 and the response thereto and set a continued hearing date for the
21 initial status conference.

22 ⁴The bankruptcy court issued memoranda of decision in
23 conjunction with its dismissals of the FAC and the SAC. These
24 memoranda included detailed descriptions of both complaints and
25 their allegations. In light of our analysis and resolution of
26 this appeal, no purpose would be served by our including in this
27 decision a lengthy description of the allegations of either
28 complaint.

29 ⁵Pineda alleged within the four claims for relief that the
30 defendants had violated the following California and federal laws
31 among others: (1) the Truth in Lending Act, 15 U.S.C. §§ 1600, et
32 seq.; (2) Fed. FDCPA; (3) the Real Estate Settlement Procedures
33 Act, 12 U.S.C. § 2605(e); (4) California's Unfair Competition
34 Law, Cal. Bus. & Profs. Code §§ 17200, et seq.; (5) Cal Civ. Code
35 § 2924(a) (wrongful foreclosure); and (6) Cal. Civ. Code § 1709
36 (fraud and deceit).

1 Sachs formed Goldman Sachs' Risk Mortgage Trust 2003-09
2 ("Trust"); (6) When Goldman Sachs aggregated the Loan with other
3 home loans to form a portfolio of loans that purportedly became
4 property of the Trust; (7) When Goldman Sachs sold fractional
5 interests in the Trust to third-party investors; (8) when BOA
6 refused to properly, accurately and/or timely respond to Pineda's
7 requests for a loan modification, for an accounting, and for
8 other information regarding the Loan; and (9) when BOA and
9 ReconTrust Company commenced foreclosure proceedings under the
10 Trust Deed.

11 **D. Dismissal of the FAC, and the Court's Warnings Regarding**
12 **Standing and Abstention**

13 All of the named defendants (collectively, "Defendants")
14 filed a motion to dismiss the FAC, which the bankruptcy court
15 granted without prejudice and with leave to amend. On June 24,
16 2011, the bankruptcy court entered a memorandum decision and
17 order explaining in detail its reasoning for dismissing the FAC
18 ("FAC Dismissal Memorandum"). In the FAC Dismissal Memorandum,
19 the bankruptcy court initially pointed out that, even though the
20 FAC contained 28 pages and 131 paragraphs of allegations, it was
21 short on the specifics regarding who harmed Pineda and how he was
22 harmed. Instead, much of the FAC focused on how the alleged
23 conduct of Defendants and others involved in the secondary
24 mortgage market harmed those who invested in that market, caused
25 a nationwide financial crisis and precipitated a significant drop
26 in real estate values, including the value of Pineda's Property.

27 The bankruptcy court looked at each of Pineda's four claims
28 for relief as well as many of the alleged violations of

1 California and federal law and determined that Pineda had not
2 stated any plausible claims for relief. As to each claim and
3 alleged violation, the court held that Pineda had failed to
4 allege essential elements.

5 More importantly for our purposes, the bankruptcy court
6 discussed in the FAC Dismissal Memorandum Pineda's apparent lack
7 of standing to prosecute the Adversary Proceeding and whether it
8 might be appropriate for the court to abstain under 28 U.S.C.
9 § 1334(c)(1). With respect to standing, the court pointed out
10 that Pineda's claims against the Defendants were property of the
11 estate under § 541(a) and that only the Trustee had standing to
12 prosecute the claims on behalf of the estate. The court noted
13 that, while Pineda had disclosed the existence of the claims on
14 his original Schedule C and his Amended Schedule B, the Trustee
15 had not taken any steps to formally abandon the claims or to
16 permit Pineda to pursue them on behalf of the estate. The court
17 stated that it would not rule on standing grounds at that point,
18 but it advised Pineda that he needed to take action to obtain
19 from the Trustee either formal abandonment of the claims or
20 authorization for Pineda to pursue them.

21 As for discretionary abstention under 28 U.S.C.
22 § 1334(c)(1), the court opined that it was authorized to sua
23 sponte consider whether it should exercise its discretion to
24 abstain. The court noted that Pineda already had been granted
25 his chapter 7 discharge and that the Trustee already had issued a
26 no-asset report indicating that there were no assets to
27 administer on behalf of the estate. Consequently, the court
28 said, there did not appear to be any reason for the bankruptcy

1 court to exercise jurisdiction over the Adversary Proceeding,
2 except as a remnant of Pineda's completed chapter 7 case.

3 Accordingly, the court warned Pineda:

4 If the Plaintiff elects to file a second amended
5 complaint, he must be . . . prepared to address why
6 this court should not abstain from hearing this
7 adversary proceeding. No Bankruptcy Code issues appear
8 to remain in this case, nor any assets to be
9 administered by the trustee or the Plaintiff through
10 any plan.

11 FAC Dismissal Memorandum (Jun. 24, 2011) at 32.

12 In July 2011, just before he filed his SAC, Pineda attempted
13 to address the bankruptcy court's standing concerns by obtaining
14 the Trustee's signature on the Stipulation To Abandon and by
15 filing it in the Adversary Proceeding. But the bankruptcy court
16 never entered any order approving the Stipulation to Abandon or
17 authorizing the Trustee's abandonment of Pineda's claims against
18 the Defendants. Among other problems, there was no proof of
19 service indicating that either the Trustee or Pineda gave anyone
20 notice of the Trustee's proposed abandonment of Pineda's claims.

21 **E. Pineda's SAC**

22 Pineda then filed his SAC. The SAC stated significantly
23 fewer allegations of general misconduct against the Defendants,
24 but many of the same themes from the FAC were still present.
25 First, Pineda alleged that BOA as originator of the Loan lied to
26 Pineda about the source of funds it used to make the Loan and
27 later refused to disclose the true source of funds for the Loan.
28 Second, Pineda alleged that BOA twice purported to assign the
29 Loan creating uncertainty as to who owned the Loan. Third,
30 Pineda alleged that, as a result of BOA's actions and a
31 succession of purported owners of the Loan and trustees of the

1 Trust, uncertainty existed as to who was entitled to enforce the
2 Loan and who was entitled to act as their agent. And fourth,
3 Pineda alleged that BOA's and ReconTrust's Loan enforcement
4 activities, including their commencement of nonjudicial
5 foreclosure proceedings, were fraudulent, illegal and full of
6 inaccuracies and procedural errors.

7 Based on these allegations, the SAC contained the following
8 four claims for relief: (1) for declaratory relief; (2) for
9 foreclosure fraud; (3) for wrongful foreclosure; and (4) for
10 rescission of contract.

11 The SAC's prayer for relief requested the following: (1) an
12 evidentiary hearing to determine the rights and obligations of
13 the parties; (2) a finding of foreclosure fraud giving rise to
14 punitive damages; (3) a finding of wrongful foreclosure;
15 (4) rescission of contract based on lack of consideration and
16 mutual assent; (5) a declaration that the Note effectively was
17 unsecured; (6) punitive damages; (7) a declaration that
18 Defendants had breached various agreements and had violated the
19 Real Estate Settlement Procedures Act and California's Unfair
20 Competition Law; (8) a finding of fraudulent foreclosure against
21 BOA and ReconTrust; and (9) a finding the neither BOA nor
22 ReconTrust had authority under California law to commence
23 foreclosure proceedings against Pineda.

24 **F. Dismissal of the SAC, and the Court's Further Consideration**
25 **of Abstention**

26 On September 26, 2011, the Defendants moved to dismiss the
27 SAC, and in December 2011, the bankruptcy court granted that
28 motion. On December 6, 2011, the bankruptcy court issued a

1 memorandum decision and order explaining in detail its reasoning
2 for dismissing the SAC ("SAC Dismissal Memorandum"). In the SAC
3 Dismissal Memorandum, the bankruptcy court determined that Pineda
4 had failed to state any plausible claims for relief in his SAC.
5 The court carefully evaluated each of the SAC's claims for relief
6 and concluded that each claim for relief was missing allegations
7 of one or more essential elements.

8 More importantly, the court once again raised the issue of
9 discretionary abstention. The court noted that it previously had
10 raised the abstention issue in its earlier FAC Dismissal
11 Memorandum, that it had directed Pineda to address the abstention
12 issue if he filed an SAC, and that Pineda had not addressed the
13 abstention issue either in his SAC or in his opposition to the
14 Defendants' dismissal motion. The court held that Pineda's
15 Adversary Proceeding had nothing to do with his chapter 7
16 bankruptcy case, any of Pineda's rights as a chapter 7 debtor, or
17 the administration of estate assets. The court further opined:

18 The Plaintiff fails to provide the court with any
19 substantial arguments as to why his litigation of state
20 and non-bankruptcy issues should be tried in this
21 specialized court rather than properly in either the
22 state court or district court, each being courts of
23 general jurisdiction. Though bankruptcy courts
24 regularly preside over matters arising under state law,
25 such is done to further the purposes of the Bankruptcy
26 Code and statutory scheme providing for debtors and
27 creditors enacted by Congress.

28 SAC Dismissal Memorandum (Dec. 6, 2011), at p. 22.

On the one hand, the bankruptcy court stated in the SAC
Dismissal Memorandum that "it is appropriate for the court to
abstain." Id. On the other hand, the court stated that it would
issue an Order to Show Cause why the court should not abstain,

1 thereby indicating a willingness to give Pineda one last chance
2 to address the issue and to attempt to persuade the court that
3 abstention was inappropriate.

4 Consistent with the SAC Dismissal Memorandum, the bankruptcy
5 court entered the Second Dismissal Order on December 6, 2011,
6 granting the Defendants' motion to dismiss the SAC. That order
7 provided for: (1) the dismissal of the case without prejudice and
8 without leave to amend; and (2) the issuance of an order to show
9 cause why the court should not abstain under 28 U.S.C.

10 § 1334(c)(1). In addition, the SAC Dismissal Order prohibited
11 Pineda from filing another amended complaint and from filing a
12 motion to amend pending the hearing on the order to show cause.

13 **G. Order to Show Cause re Abstention and Pineda's Response**

14 The bankruptcy court thereafter issued its order to show
15 cause why it should not abstain from hearing the Adversary
16 Proceeding, and Pineda filed a memorandum of points and
17 authorities explaining why he thought abstention was
18 inappropriate. Citing McDaniel v. ABN Amro Mortg. Group,
19 364 B.R. 644, 650 (S.D. Ohio 2007), Pineda stated that there were
20 thirteen factors the court should consider before abstaining
21 under 28 U.S.C. § 1334(c)(1). Pineda contended that all of the
22 McDaniel factors militated against abstention. We identify below
23 each of these factors and the reason (if any) Pineda gave why
24 each factor militated against abstention.

25 **1. The effect or lack of effect on the efficient**
26 **administration of the estate if a court abstains**

27 According to Pineda, his claims against the Defendants
28 impacted the bankruptcy estate because no notice was given to

1 creditors or any other interested parties of the Trustee's intent
2 to abandon as reflected in the Stipulation To Abandon.⁶

3 Pineda further asserted that his being subjected to
4 "financial double jeopardy" and the cloud on title to the
5 Property also impacted the estate, but he did not explain how the
6 estate was impacted. Nor was any impact on the estate evident.
7 He already had received his chapter 7 discharge from his
8 prepetition liabilities and it was obvious the Trustee had no
9 intention of administering the Property or the Adversary
10 Proceeding claims.

11 Finally, Pineda mentions certain allegedly inconsistent
12 exhibits and declaration testimony presented by the Defendants in
13 the course of his litigation against them, but once again Pineda
14 did not in any way tie these concerns to the bankruptcy estate.

15 **2. The extent to which state law issues predominate over**
16 **bankruptcy issues**

17 Pineda did not identify a single bankruptcy claim or issue
18 from his SAC. Instead, Pineda in essence argued that the
19 Trustee's failure to effectively abandon the Adversary Proceeding
20 claims meant that they technically still were property of the
21 estate. Thus, Pineda suggested that because the Adversary
22 Proceeding Claims were still estate property, those claims -
23 claims explicitly based on California and federal non-bankruptcy

24
25 ⁶This argument is particularly ironic. The record reflects
26 that Pineda filed the Stipulation To Abandon on behalf of the
27 Trustee but did not file any proof of service along with that
28 stipulation. Pineda needed to establish his standing to
prosecute the Adversary Proceeding, but his argument against
abstention seriously undermines his efforts to establish his
standing.

1 law - somehow became claims based on bankruptcy law for purposes
2 of this factor.

3 **3. The difficulty or unsettled nature of the applicable**
4 **state law**

5 According to Pineda, his complaint presented no difficult or
6 unsettled state law issues.

7 **4. The presence of a related proceeding commenced in state**
8 **court or other non-bankruptcy court**

9 According to Pineda, there no longer was any pending action
10 in state court. But he did not present anything to the
11 bankruptcy court demonstrating that the State Court Lawsuit
12 actually had been dismissed.

13 **5. The jurisdictional basis, if any, other than 28 U.S.C.**
14 **§ 1334**

15 Pineda did not really give any reason why this factor
16 militated against abstention. He merely reiterated his belief
17 that bankruptcy court jurisdiction was appropriate under
18 28 U.S.C. §§ 1334 and 157(b)(2)(K).

19 **6. The degree of relatedness or remoteness of the**
20 **proceeding to the main bankruptcy case**

21 Pineda argued that the Adversary Proceeding claims were
22 interrelated with the bankruptcy case because the claims would in
23 essence determine the issue of who was entitled to enforce the
24 Loan. But Pineda offered no explanation why that issue was of
25 any relevance to the bankruptcy case, when Pineda already had
26 been discharged and the Trustee obviously had no intention of
27 administering the Property which secured the Loan.

1 **7. The substance rather than form of an asserted core**
2 **proceeding**

3 According to Pineda, the substance of the core proceeding
4 would be the determination of who was entitled to enforce the
5 Loan. However, Pineda did not identify any genuine connection
6 between this purportedly core proceeding and his bankruptcy case.

7 **8. The feasibility of severing state law claims from core**
8 **bankruptcy matters to allow judgments to be entered in state**
9 **court with enforcement left to the bankruptcy court**

10 Pineda asserted that the purportedly core claims could not
11 be severed from his state law claims "because of the tainted
12 documents submitted by the defendants." Pineda's assertion is
13 incomprehensible, nonsensical, or both.

14 **9. The burden on this court's docket**

15 According to Pineda, while there might be some burden, the
16 bankruptcy court should take into account the fact that it
17 already was very familiar with his Adversary Proceeding, whereas
18 any state court presiding over the matter would be starting from
19 scratch. Pineda ignores the fact that, after over a year of
20 bankruptcy court litigation and after having filed three versions
21 of his complaint, his Adversary Proceeding had not gotten past
22 the pleading stage. Nor had discovery commenced. Even if the
23 bankruptcy court had been willing to give him another chance to
24 amend his complaint, the bankruptcy court litigation was still
25 very much just beginning.

1 **10. The likelihood that the commencement of the proceeding**
2 **in bankruptcy court involves forum shopping by one of the**
3 **parties.**

4 Pineda claimed there was no indication of forum shopping on
5 his part. The bankruptcy court found otherwise, as we discuss
6 below.

7 **11. The existence of a right to a jury trial**

8 Pineda did not directly answer the question of whether any
9 of the parties to the Adversary Proceeding still might claim a
10 right to a jury trial. Instead, he merely stated that he had not
11 requested a jury trial.

12 **12. The presence in the proceeding of non-debtor parties**

13 Pineda did not directly address this factor either. He
14 merely stated that “[n]o issues of non-debtor parties is
15 presently a factor.” Pineda ignored the fact that all of the
16 Defendants were non-debtor parties, and that none of them had
17 filed proofs of claims or otherwise participated in his
18 bankruptcy case, except as parties to the adversary proceeding.

19 **13. Any unusual or other significant factors**

20 Pineda did not identify any unusual factors, but he did
21 claim that the court could authorize him to prosecute the
22 Adversary Proceeding on behalf of the estate as if he were
23 “debtor-in-possession.” This is simply wrong. There is no such
24 thing as a chapter 7 debtor in possession.

25 **H. The Abstention Hearing and the Abstention Ruling**

26 On February 22, 2012, the bankruptcy court held a hearing on
27 the Order to Show Cause during which the court engaged in a
28 lengthy colloquy with Pineda regarding the propriety of

1 abstention. At the conclusion of the colloquy, the court ruled
2 that it was going to sustain its Order to Show Cause and that it
3 was going to abstain from hearing the Adversary Proceeding.

4 The court's reasoning supporting its abstention ruling is
5 set forth in a minute entry dated February 22, 2012 ("Abstention
6 Minute Entry"). In the Abstention Minute Entry, after
7 summarizing the procedural history of the bankruptcy case and the
8 contents of the SAC, the bankruptcy court noted once again that
9 the bankruptcy case was completed some time ago, when Pineda
10 received his discharge and when the trustee determined that there
11 were no assets worth administering on behalf of the estate. The
12 court acknowledged that the Trustee had not formally abandoned
13 the Adversary Proceeding claims, that the Stipulation to Abandon
14 was not effective to abandon them formally, and so the Adversary
15 Proceeding claims technically were still estate assets. But the
16 court found that, during the more than 21 months the bankruptcy
17 case had been open, neither the Trustee nor any creditors had
18 shown any interest in having the claims prosecuted on behalf of
19 and for the benefit of the estate. Hence, the court reasoned, it
20 was clear that the Adversary Proceeding claims would be
21 prosecuted, if at all, by Pineda for his own personal benefit.
22 Citing Christensen v. Tucson Estates, Inc. (In re Tucson Estates,
23 Inc.), 912 F.2d 1162, 1167 (9th Cir.1990), the bankruptcy court
24 stated that the Ninth Circuit had adopted factors to guide the
25 abstention analysis identical to the abstention factors Pineda
26 had drawn from McDaniel. Set forth below is a summary of the
27 court's consideration of each of these factors.

28

1 **1. The effect or lack thereof on the efficient**
2 **administration of the estate if a Court recommends**
3 **abstention**

4 The bankruptcy court pointed out that, by filing his no
5 asset report and by signing off on the Stipulation to Abandon,
6 the Trustee had indicated many months before that he was finished
7 administering the bankruptcy estate. Consequently, the
8 prosecution of the Adversary Proceeding claims would have no
9 bearing on estate administration regardless of where and whether
10 Pineda prosecuted the claims for his own benefit.

11 **2. The extent to which state law issues predominate over**
12 **bankruptcy issues**

13 According to the bankruptcy court, the SAC raised no
14 bankruptcy law issues. Moreover, the bankruptcy court found, the
15 Adversary Proceeding would not affect the estate in any way.

16 **3. The difficulty or unsettled nature of the applicable law**

17 The bankruptcy court agreed with Pineda that California law
18 governing foreclosure procedures is generally well settled.
19 However, the court pointed out that Pineda's SAC did not limit
20 itself to an attack on the foreclosure procedures utilized by BOA
21 and ReconTrust. Rather, Pineda attempted to assert in the SAC
22 relatively novel legal theories purportedly entitling him to
23 invalidate lien rights if the Defendants (1) failed to accurately
24 disclose to him the source of funds for his Loan or
25 (2) transferred the rights under the Loan to a mortgage loan
26 securitization trust.

1 **4. The presence of a related proceeding commenced in state**
2 **court or other nonbankruptcy court**

3 The bankruptcy court noted that, even if the State Court
4 Lawsuit no longer was pending, there was no bar to Pineda
5 commencing a new action in state court.

6 **5. The jurisdictional basis, if any, other than 28 U.S.C.**
7 **§ 1334**

8 The bankruptcy court noted that Pineda had not posited any
9 basis for federal court jurisdiction other than 28 U.S.C. § 1334.

10 **6. The degree of relatedness or remoteness of the**
11 **proceeding to the main bankruptcy case**

12 The bankruptcy court found that there was no connection
13 between the Adversary Proceeding and Pineda's bankruptcy case.
14 As the bankruptcy court put it, the Trustee had demonstrated that
15 he had no intention of either prosecuting the Adversary
16 Proceeding claims or otherwise administering them for the benefit
17 of the estate. The court also mentioned that Pineda was not
18 seeking to reorganize in a chapter 11 or rehabilitate in a
19 chapter 13.

20 **7. The substance rather than form of an asserted "core"**
21 **proceeding**

22 The bankruptcy court ruled that none of the Adversary
23 Proceeding claims constituted a core proceeding. According to
24 the bankruptcy court, the Adversary Proceeding was a "related-to"
25 matter in which all of the claims were based on non-bankruptcy
26 law and were based on events that arose prior to and/or
27 independent of Pineda's bankruptcy case.

1 **8. The feasibility of severing state law claims from core**
2 **bankruptcy matters to allow judgments to be entered in state**
3 **court with enforcement left to the bankruptcy court**

4 According to the bankruptcy court, Pineda had not stated any
5 core bankruptcy claims to sever.

6 **9. The burden on [the bankruptcy court's] docket**

7 The court stated that its docket was significantly impacted
8 and that, with all of the matters it had genuinely arising under
9 Title 11, arising in cases under Title 11, or in related-to
10 matters actually impacting the bankruptcy case, it was in no
11 position to hear the Adversary Proceeding.

12 **10. The likelihood that the commencement of the proceeding**
13 **in bankruptcy court involves forum shopping by one of the**
14 **parties**

15 The bankruptcy court found that Pineda was seeking to forum
16 shop based on two grounds: (1) the advantages of the automatic
17 stay, and (2) an apparent belief that he was less likely to
18 prevail if he prosecuted his claims in state court.⁷

19 _____
20 ⁷In this regard, Pineda's comments at the February 22, 2012
21 abstention hearing seemed to confirm the court's forum shopping
suspensions, as follows:

22 MR. PINEDA: But I think it's morally wrong, your
23 Honor, to allow the bank to basically --

24 THE COURT: Then go to court that properly has
25 jurisdiction to exercise the State Court's -- Superior
26 Court[s] have general jurisdiction where you can raise
it. If you have a federal --

27 MR. PINEDA: They've already taken judicial notice of
28 the bogus assignment. I'm going to go in there dead on

(continued...)

1 **11. The existence of a right to a jury trial**

2 The bankruptcy court acknowledged that the Defendants had
3 not filed an answer yet, so it was unknown whether they would
4 claim a right to a jury trial. But the bankruptcy court pointed
5 out that the claims were the type for which jury trial rights
6 exist.

7 **12. The presence in the proceeding of nondebtor parties**

8 Curiously, the court stated that the Adversary Proceeding
9 only involved Pineda and BOA. The bankruptcy court did not
10 mention the other Defendants or the fact that none of the
11 Defendants had filed a proof of claim or otherwise participated
12 in Pineda's bankruptcy case, except as defendants in the
13 Adversary Proceeding.

14 Separate and apart from the Tucson factors, the bankruptcy
15 court also noted the conundrum Pineda faced regarding standing.
16 As the court put it, the Adversary Proceeding claims technically
17 were still estate property and apparently would remain estate
18 property until the bankruptcy case was closed. As such, Pineda
19 still lacked standing to prosecute the claims. While Pineda
20 could have attempted to cure his lack of standing by taking
21 additional steps towards formal abandonment of the claims, this
22 only would have served to further undermine any lingering
23 technical connection between the claims and his bankruptcy case.

24 At the conclusion of its abstention analysis, the bankruptcy
25

26 ⁷(...continued)
27 arrival.

28 Hr'g Tr. (Feb 22, 2012) at 16:6-14.

1 court stated:

2 For this bankruptcy court to continue with the
3 litigation would have it make a determination on new,
4 uncharted state law theories, invalidate notes and
5 deeds of trust, terminate rights in real property, and
6 award actual and punitive damages to [Pineda], all of
7 which has no impact on the bankruptcy estate. To do so
8 disregards the California Superior Courts as the state
9 court of general jurisdiction to address those issues,
10 and intrudes bankruptcy jurisdiction when it has no
11 impact on the bankruptcy case.

12 Abstention Minute Entry (Feb. 22, 2012) at p. 6.

13 On February 27, 2012, the bankruptcy court entered its
14 Abstention Order. In addition to abstaining from hearing the
15 Adversary Proceeding pursuant to 28 U.S.C. § 1334(c)(1), the
16 court also directed the clerk of court to close the adversary
17 proceeding and prohibited Pineda from filing any further
18 complaints or motions seeking relief from the bankruptcy court.

19 **I. Pineda's Filing of a Notice of Appeal and a Motion for Leave**
20 **to Appeal**

21 On December 20, 2011, Pineda timely filed a notice of appeal
22 from the December 6, 2011 Second Dismissal Order. Pineda did not
23 file either a new notice of appeal or an amended notice of appeal
24 after the court entered the Abstention Order. But in response to
25 an order from this Panel issued on February 16, 2012, questioning
26 the finality of the Second Dismissal Order, Pineda filed on
27 March 7, 2012, a motion for leave to appeal. We discuss below
28 the implications of these filings on our jurisdiction.

JURISDICTION

Generally speaking, we have jurisdiction to review final
bankruptcy court orders and judgments under 28 U.S.C. § 158, and
the bankruptcy court's jurisdiction is based on 28 U.S.C. § 1334.

1 We further address our jurisdiction and the bankruptcy court's
2 jurisdiction in the discussion section of this decision.

3 **ISSUES**

- 4 1. Do we have jurisdiction to review the Abstention Order?
5 2. Did the bankruptcy court abuse its discretion by abstaining
6 from hearing the Adversary Proceeding under 28 U.S.C.
7 § 1334(c)(1)?
8 3. Do any of Pineda's arguments on appeal justify reversal?

9 **STANDARDS OF REVIEW**

10 We must raise sua sponte issues regarding our appellate
11 jurisdiction, and we review those issues de novo. See Belli v.
12 Temkin (In re Belli), 268 B.R. 851, 853-54 (9th Cir. BAP 2001).

13 We review the bankruptcy court's Abstention Order for an
14 abuse of discretion. In re Bankr. Petition Preparers who are not
15 Certified Pursuant to Requirements of Ariz. Sup. Ct.,
16 307 B.R. 134, 140 (9th Cir. BAP 2004). Under the abuse of
17 discretion standard of review, we first "determine de novo
18 whether the [bankruptcy] court identified the correct legal rule
19 to apply to the relief requested." United States v. Hinkson,
20 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). And if the
21 bankruptcy court identified the correct legal rule, we then
22 determine under the clearly erroneous standard whether its
23 factual findings and its application of the facts to the relevant
24 law were: "(1) illogical, (2) implausible, or (3) without support
25 in inferences that may be drawn from the facts in the record."
26 Id. (internal quotation marks omitted).

1 DISCUSSION

2 A. Appellate Jurisdiction

3 As mentioned above, Pineda timely filed a notice of appeal
4 from the Second Dismissal Order on December 20, 2011. However,
5 the Second Dismissal Order was not a final order because it did
6 not fully and finally dispose of the Adversary Proceeding. The
7 Second Dismissal Order explicitly left open for future
8 determination the issue of abstention, and the bankruptcy court
9 clearly anticipated further proceedings on the abstention issue
10 at the time it entered the Second Dismissal Order. Consequently,
11 the Second Dismissal Order was interlocutory - not final -
12 because it did not manifest the court's intent to be its final
13 act in the matter. See Brown v. Wilshire Credit Corp.
14 (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007); Mullen v.
15 Hamlin (In re Hamlin), 465 B.R. 863, 868 (9th Cir. BAP 2012).

16 We generally lack jurisdiction to hear appeals from
17 interlocutory orders unless we grant leave to appeal. See
18 Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687
19 (9th Cir. BAP 2010). On February 16, 2012, the Panel issued an
20 order advising Pineda of the finality defect and directing him
21 either to file a motion for leave to appeal or to take other
22 action to establish that the Panel had jurisdiction over his
23 appeal. In response, Pineda filed both a motion for leave to
24 appeal and a responsive brief explaining why he believed the
25 Second Dismissal Order was a final order. He filed these
26 documents with the Panel on March 6, 2012, and in the adversary
27 proceeding on March 7, 2012.

28 In relevant part, the leave motion references the bankruptcy

1 court's abstention ruling and "respectfully requests this
2 Honorable Panel grant leave to appeal" the abstention ruling.
3 After reviewing Pineda's response, our motions panel issued an
4 order deeming the finality defect satisfied as a result of the
5 bankruptcy court's entry of the Abstention Order on February 27,
6 2012.

7 The entry of the Abstention Order "cured" the finality
8 defect associated with Pineda's appeal of the Second Dismissal
9 Order. See Parks v. Drummond (In re Parks), 475 B.R. 703, 706
10 (9th Cir. BAP 2012); see also Rains v. Finn (In re Rains),
11 428 F.3d 893, 901 (9th Cir 2005); Cato v. Fresno City, 220 F.3d
12 1073, 1074-75 (9th Cir. 2000); Dannenberg v. Software Toolworks,
13 Inc., 16 F.3d 1073, 1075 (9th Cir. 1994).

14 Nonetheless, even if the entry of the Abstention Order
15 effectively gave us jurisdiction to review the Second Dismissal
16 Order, our review of that order would be moot unless Pineda also
17 appealed the Abstention Order. In other words, unless we also
18 have jurisdiction over the Abstention Order, there is no way we
19 could provide any meaningful relief with respect to any rulings
20 in the Second Dismissal Order. See, e.g., In re Parks, 475 B.R.
21 at 706; Omoto v. Ruggera (In re Omoto), 85 B.R. 98, 99-100 (9th
22 Cir. BAP 1988).

23 In order to appeal the Abstention Order, Pineda should have
24 filed pursuant to Rules 8001 and 8002 either a new notice of
25 appeal or an amended notice of appeal within the time limits
26 specified in Rule 8002. In the absence of either, our
27 jurisdiction would be limited to reviewing the Second Dismissal
28 Order. See, e.g., United Computer Sys., Inc. v. AT & T Corp.,

1 298 F3d 756, 761 (9th Cir. 2002) (limiting review to timely
2 appealed judgment); Pacific Employers Ins. Co. v. Domino's Pizza,
3 Inc., 144 F3d 1270, 1278 (9th Cir. 1998)(same); see generally
4 Rule 8002(b)(4) ("A party intending to challenge an alteration or
5 amendment of the judgment, order, or decree shall file a notice,
6 or an amended notice, of appeal within the time prescribed by
7 this Rule 8002 measured from the entry of the order disposing of
8 the last such motion outstanding.").

9 On the other hand, before the expiration of the time to
10 appeal the Abstention Order, Pineda filed his motion for leave to
11 appeal. The leave motion explicitly requested that the Panel
12 grant Pineda permission to appeal the Abstention Order. While
13 not formally entitled a notice of appeal, there is little doubt
14 that Pineda expressed an intent to appeal the Abstention Order.
15 And while his leave motion did not satisfy all of the
16 requirements for a notice of appeal under Rule 8001(a),⁸ that
17 rule does not indicate that those requirements necessarily apply
18 to an amended notice of appeal.

19 In light of the above circumstances, the liberal
20 construction given to notices of appeal, and the general policy
21 favoring decisions on the merits, we will construe Pineda's leave
22 motion as an amended notice of appeal seeking review of the
23

24 ⁸Rule 8001(a) states in relevant part:

25 The notice of appeal shall (1) conform substantially to
26 the appropriate Official Form, (2) contain the names of
27 all parties to the judgment, order, or decree appealed
28 from and the names, addresses, and telephone numbers of
their respective attorneys, and (3) be accompanied by
the prescribed fee.

1 Abstention Order. See, e.g., Smith v. Barry, 502 U.S. 244,
2 248-50 (1992) (construing pro se's appellate brief as a potential
3 notice of appeal); Brannan v. U.S., 993 F.2d 709 (9th Cir. 1993)
4 (construing pro se's letter challenging district court order as a
5 notice of appeal).⁹ Even though Pineda intended the leave motion
6 to serve as a request for leave to appeal under Rule 8003(a),
7 this does not mean that the leave motion could not also serve as
8 an amended notice of appeal for purposes of Rules 8001 and 8002.
9 See Smith, 502 U.S. at 249.

10 Accordingly, we will proceed to examine the merits of the
11 Abstention Order.

12 **B. Review of Abstention Order**

13 By way of district court referral, bankruptcy courts have
14 original but not exclusive jurisdiction over all civil
15 proceedings arising under title 11, or arising in or related to
16 cases under title 11. See 28 U.S.C. § 1334(b); 28 U.S.C.
17 § 157(a). A proceeding "arises under" title 11 if it asserts a
18 right to relief created by the Bankruptcy Code. See Cal.
19 Franchise Tax Bd. v. Wilshire Courtyard (In re Wilshire
20 Courtyard), 459 B.R. 416, 424 (9th Cir. BAP 2011). A proceeding
21 "arises in" a case under title 11 if it is an administrative
22

23
24 ⁹We note that the appellants in Smith and Brannan were pro
25 se litigants. We also note that Pineda, while nominally a pro se
26 litigant, was formerly an attorney. It is questionable whether
27 the liberality afforded to pro ses without formal legal training
28 should be extended to Pineda, who obviously had such training and
who obviously knew how to file a notice of appeal. In the final
analysis, however, these concerns are not sufficient to cause us
to depart from our conclusion that we have jurisdiction to review
the Abstention Order.

1 matter that only could occur in a bankruptcy case and would have
2 no existence outside of bankruptcy. See id.; Krasnoff v.
3 Marshack (In re General Carriers Corp.), 258 B.R. 181, 189 (9th
4 Cir. BAP 2001). Meanwhile, a proceeding typically is considered
5 "related to" a case under title 11 proceeding if it potentially
6 will have some impact on the bankruptcy case or the bankruptcy
7 estate, but it does not invoke a right to relief created by the
8 Bankruptcy Code and could exist outside of bankruptcy. Id.

9 In an effort to define which types of proceedings
10 non-Article-III bankruptcy judges could hear and determine by
11 final judgment, Congress created a non-exhaustive list of
12 so-called "core" proceedings. See 28 U.S.C. § 157(b)(2); see
13 also Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins.
14 Agency, Inc.), 702 F.3d 553, 565 (9th Cir. 2012).

15 Notwithstanding the broad jurisdictional grant afforded to
16 bankruptcy courts under 28 U.S.C. §§ 1334(b) and 157(a), Congress
17 also has given bankruptcy courts discretionary authority to
18 abstain from hearing certain matters:

19 . . . nothing in this section prevents a district court
20 in the interest of justice, or in the interest of
21 comity with State courts or respect for State law, from
22 abstaining from hearing a particular proceeding arising
under title 11 or arising in or related to a case under
title 11.

23 28 U.S.C. § 1334(c)(1).¹⁰

24
25 ¹⁰Rule 5011(b) at one time prohibited bankruptcy courts from
26 entering final abstention orders, but that Rule was amended in
27 1991 explicitly for the purpose of ending that prohibition. See
28 Advisory Committee Notes Accompanying Rule 5011. In addition,
courts have held that bankruptcy courts have authority to enter

(continued...)

1 Here, the bankruptcy court considered Pineda's SAC, the
2 relevant circumstances from Pineda's bankruptcy case and the
3 permissive abstention factors recited in In re Tucson Estates,
4 Inc., 912 F.2d at 1167. It thereafter concluded that it would
5 abstain under 28 U.S.C. § 1334(c)(1).

6 It bears repeating at this point that, under the abuse of
7 discretion standard of review, if the bankruptcy court identified
8 the correct legal rule to apply, we only will overturn its
9 decision if its factual findings or its application of facts to
10 the law were "illogical, implausible or without support in
11 inferences that may be drawn from facts in the record." Hinkson,
12 585 F.3d at 1262.

13 In this case, the bankruptcy court applied the correct law.
14 It considered, among other factors, the Tucson Estates factors.
15 We already have gone over in detail both Pineda's assessment of
16 these factors and the bankruptcy court's assessment of these
17 factors. It suffices for us to say here that we disagree with
18 most of Pineda's assessment and that we agree with substantially
19 all of the bankruptcy court's assessment. We certainly do not
20 see anything in the bankruptcy court's assessment that is

21
22 ¹⁰(...continued)
23 final orders for discretionary abstention under 28 U.S.C.
24 § 1334(c)(1), even in non-core proceedings. See Holtzclaw v.
25 State Farm Fire and Casualty Co. (In re Holtzclaw), 131 B.R. 162,
26 164 (E.D. Cal. 1991) (citing cases). In any event, by not
27 objecting to the bankruptcy court entering a final decision and
28 by all of his other conduct before the bankruptcy court and on
appeal, Pineda has forfeited any objection he otherwise might
have made to the bankruptcy court's entry of a final abstention
order. See In re Bellingham Ins. Agency, Inc., 702 F.3d at
566-70.

1 illogical, implausible or without support in the record. Nor
2 does anything in Pineda's opening appeal brief persuade us
3 otherwise, as we explain below.

4 Furthermore, we also agree with the bankruptcy court's
5 overarching assessment that the Adversary Proceeding would not
6 have any impact on either the bankruptcy estate or the bankruptcy
7 case, given that Pineda already had received his discharge and
8 given that the Trustee had clearly demonstrated that he had no
9 interest in administering either the Property or the Adversary
10 Proceeding claims on behalf of and for the benefit of the estate.

11 In short, we see no reversible error in the bankruptcy
12 court's abstention ruling.

13 **C. Pineda's Arguments on Appeal**

14 In addition to Pineda's differing assessment of the Tucson
15 Estates factors, which we addressed above, Pineda's opening
16 appeal brief makes four other arguments why we should reverse the
17 bankruptcy court's abstention order. We will address each of
18 these arguments in turn.

19 **1. 28 U.S.C. § 157(b)(2)(K)**

20 First, Pineda has argued on appeal that the bankruptcy court
21 erred in entering the Abstention Order because the bankruptcy
22 court did not acknowledge that his Adversary Proceeding in part
23 sought a determination of the validity of liens against the
24 Property. Consequently, Pineda argues, the Adversary Proceeding
25 was a core proceeding under 28 U.S.C. § 157(b)(2)(K), so the
26 bankruptcy court should not have abstained.

27 But Pineda's reliance on the nominally core nature of his
28 lien validity claim is misplaced. Section 1334(c)(1) and the

1 Tucson Estates factors permit discretionary abstention even when
2 the litigation includes core as well as non-core claims. Indeed,
3 one of the Tucson Estates factors called upon the bankruptcy
4 court to assess the substance rather than the form of any
5 asserted "core" claim.

6 Here, as reflected in the record, the bankruptcy court was
7 well aware that, technically, all of the Adversary Proceeding
8 claims and the Property were still property of the estate, so the
9 lien validity claim at least nominally would qualify as a
10 28 U.S.C. § 157(b)(2)(K) core proceeding. But the court also
11 considered the fact that neither the Property nor the Adversary
12 Proceeding claims were going to have any impact on either the
13 bankruptcy case or the bankruptcy estate because the bankruptcy
14 case essentially was completed. Pineda already had received his
15 chapter 7 discharge, and the Trustee had made it clear that he
16 had no intention of administering the Property, the Adversary
17 Proceeding claims or any other estate assets. Consequently, the
18 bankruptcy court found that there was no substance to Pineda's
19 so-called core claim. We cannot say that this finding was
20 illogical, implausible or without support in the record.

21 **2. Violation of Stay**

22 Second, Pineda has argued on appeal that the bankruptcy
23 court erred in entering the Abstention Order because he has a
24 claim against the Defendants pursuant to § 362(k) for violation
25 of the automatic stay. According to Pineda, sometime in early
26 2011, the Defendants rescheduled a foreclosure sale on the
27 Property for March 15, 2011. Pineda now asserts that he is
28 entitled to damages under § 362(k) because the automatic stay in

1 his bankruptcy case was still in effect.

2 Assuming without deciding that Pineda has a claim for relief
3 under § 362(k), this argument still fails. None of Pineda's
4 complaints ever attempted to state a claim for relief under
5 § 362(k). Nor did Pineda mention this prospective claim in his
6 response to the order to show cause re abstention. Nor did he
7 mention it at the abstention hearing. Simply put, Pineda did not
8 present his prospective § 362(k) claim to the bankruptcy court
9 for consideration, so we will not consider it here on appeal.

10 We typically will not consider issues raised for the first
11 time on appeal when the bankruptcy court had no opportunity to
12 consider them. See United Student Aid Funds, Inc. v. Espinosa,
13 559 U.S. 260, ___ n.9, 130 S.Ct. 1367, 1376 n.9 (2010) ("We need
14 not settle that question, however, because the parties did not
15 raise it in the courts below."); Scovis v. Henrichsen
16 (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (holding that
17 court would not consider issue raised for the first time on
18 appeal absent exceptional circumstances). Nor will we consider
19 facts and documents not before the bankruptcy court. See Oyama
20 v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir.
21 2001); Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077-78
22 (9th Cir. 1988). As stated by the Ninth Circuit in Kirschner,
23 "'We are here concerned only with the record before the trial
24 judge when his decision was made.'" Kirschner, 842 F.2d at 1077
25 (quoting United States v. Walker, 601 F.2d 1051, 1055 (9th Cir.
26 1979)).

27 Pineda contends that exceptional circumstances justify our
28 consideration of his prospective § 362(k) claim in the first

1 instance. But we are unpersuaded that there are any
2 circumstances, exceptional or otherwise, that would justify our
3 consideration of this claim. To the contrary, all of the
4 relevant circumstances militate against such consideration.
5 Pineda has admitted that he knew of the alleged stay violation in
6 or around March 2011. Even though he filed his SAC in August
7 2011, he did not include in the SAC his prospective § 362(k)
8 claim. He also did not request leave to further amend his
9 complaint to add that claim after he filed the SAC.

10 We acknowledge that, in December 2011, when the bankruptcy
11 court issued the Second Dismissal Order, the court prohibited
12 Pineda from thereafter filing another amended complaint or from
13 requesting leave to do so, at least until the court heard the
14 order to show cause re abstention. But Pineda has not explained
15 why he could not have amended his complaint to add that claim
16 before December 2011, especially when he has admitted to knowing
17 of the alleged stay violation in or around March 2011. Even
18 after December 2011, by way of the order to show cause re
19 abstention, the bankruptcy court directed Pineda to file a
20 responsive brief explaining all reasons why he thought abstention
21 was inappropriate. Pineda could have mentioned his prospective
22 § 362(k) claim in that brief, or at least at the abstention
23 hearing, but he did not do so. Accordingly, we will not consider
24 the prospective § 362(k) claim as potential grounds for reversal
25 of the Abstention Order.

26 **3. Bias/Due Process**

27 Third, Pineda has argued on appeal that the court was biased
28 against him, and as a result of that bias he was denied due

1 process. As a threshold matter, we note that Pineda is emphatic
2 he is not arguing that the bankruptcy judge had a duty to recuse
3 himself. In his reply brief on appeal, Pineda states:

4 Appellees [sic] counsels' argument of Appellant's
5 request for recusal is . . . misplaced. Appellant's
6 issue of violation of a fair hearing has been
misconstrued by Appellees [sic] counsel as a request
for recusal.

7 Aplt Reply Br. (Jun. 18, 2012) at p. 4 (emphasis added). Pineda
8 also states:

9 The Honorable Ronald H. Sargis [sic] decisions have
10 been favorable to both sides. Appellant's claims of
11 violation of due process right to fair hearing involves
12 Appellee's submission of false declaration and
13 intentional violation of [§] 362.

14 Id. at n.2.

15 Consequently, Pineda has waived any recusal argument he
16 otherwise could have made on appeal. See Burnett v. Resurgent
17 Capital Servs. (In re Burnett), 435 F.3d 971, 975-76 (9th Cir.
18 2006); Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R.
19 608, 613 (9th Cir. BAP 2002).

20 As for Pineda's due process claim, due process requires
21 reasonable notice and a meaningful opportunity to be heard. See
22 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
23 (1950); see also Mathews v. Eldridge, 424 U.S. 319, 333 (1976)
24 ("The fundamental requirement of due process is the opportunity
25 to be heard at a meaningful time and in a meaningful manner.");
26 Berry v. U.S. Trustee (In re Sustaita), 438 B.R. 198, 210 (9th
27 Cir. BAP 2010), aff'd, 460 Fed. Appx. 627 (9th Cir. 2011) ("prior
28 to sanctioning a party, the court must provide the party to be
sanctioned with particularized notice to comport with due
process.")

1 Here, Pineda had an abundance of notice and opportunity to
2 be heard on the abstention issue. The bankruptcy court raised
3 the abstention issue several times, including but not limited to
4 in the FAC Dismissal Memorandum, in the SAC Dismissal Memorandum
5 and in the order to show cause re abstention. Each time, the
6 bankruptcy court asked Pineda to explain why abstention was
7 inappropriate. The bankruptcy court also held hearings on the
8 FAC, on the SAC and on the order to show cause re abstention
9 during which Pineda had the opportunity to orally argue the
10 abstention issue. In sum, Pineda had months of notice and a
11 number of hearings to address the abstention issue. This is well
12 beyond the level of notice and opportunity for hearing that due
13 process required.

14 While not entirely clear, Pineda apparently contends that
15 the bankruptcy judge's alleged bias rendered the notice and
16 hearings meaningless. We disagree. Pineda has not pointed us to
17 anything in the record that would lead us to conclude that the
18 judge was biased against Pineda. Pineda primarily points to two
19 events that he contends establish bias. One of these was the
20 court's statement at a hearing as follows:

21 Here's the other question I had for the two of you.
22 This is still sitting in a Chapter 7, probably getting
23 close to a dismissal date, but there was a request for
24 a TRO.

25 Is the automatic stay not in effect in this case? Or
26 do you just say, Judge, I know the case will close and
27 the automatic stay is going to go away, so I just want
28 to go ahead and give you a heads up and let's get
started on the injunction.

Hr'g Tr. (April 6, 2011) at 55:12-20.

According to Pineda, the bankruptcy court demonstrated its

1 bias because it was offering potential excuses for the
2 Defendants' alleged stay violation. We disagree. In part, the
3 hearing was held to address Pineda's request for a temporary
4 restraining order to prevent a foreclosure on the Property. The
5 only logical construction of the court's statement, taken in
6 context, is that the court was perplexed why Pineda needed a
7 restraining order when the automatic stay ordinarily should have
8 been in effect and normally would have barred foreclosure
9 proceedings against the Property. If anything, the comment
10 helped Pineda because it suggested to Pineda another potential
11 ground for challenging the Defendants' actions: a potential
12 action for violation of the automatic stay.

13 In any event, the court had legitimate grounds for inquiring
14 regarding the status of the automatic stay. If the stay was
15 still in effect, Pineda had no immediate need for a temporary
16 restraining order.

17 Pineda further contends that the bankruptcy court also
18 demonstrated its bias because it never enforced Rule 7007.1,
19 which in relevant part requires any party who is a corporation to
20 file a disclosure statement identifying any corporation that owns
21 10% or more of its stock. But a procedural omission of this
22 nature simply does not amount to a showing of bias by itself. If
23 Pineda had filed a motion requesting any sort of relief based on
24 the Defendants' noncompliance with Rule 7007.1, and if the
25 bankruptcy court had denied that relief, the bankruptcy court's
26 affirmative refusal to enforce Rule 7007.1 might have raised some
27 legitimate concerns. But Pineda has not pointed us to anything
28 in the record reflecting that the court affirmatively refused to

1 enforce Rule 7007.1. Nor have we ourselves found anything in the
2 record along these lines. As a result, we do not perceive any
3 conduct which demonstrates bias.¹¹

4 **4. Prohibition Against Future Filings**

5 Finally, while Pineda did not devote any significant portion
6 of his appellate briefing to the issue, Pineda does complain in
7 passing about the provision in the bankruptcy court's Abstention
8 Order prohibiting him from filing any further complaints or
9 motions seeking relief from the bankruptcy court.¹² While the
10 bankruptcy court's prohibition seems broad in isolation, we hold
11 that it must be construed in the context in which it was made and
12 limited on that basis. We construe this prohibition as only
13 applying to the Adversary Proceeding and the Adversary Proceeding
14 claims. Given that limited construction of the prohibition and
15 given our holding that the bankruptcy court properly abstained
16 from hearing the Adversary Proceeding claims, we hold that the
17 bankruptcy court did not commit reversible error by including the
18 prohibition in its Abstention Order.

22 ¹¹Pineda also argues that, because the bankruptcy court did
23 not enforce Rule 7007.1 sua sponte, that failure by itself is
24 reversible error. For the same reason we rejected above Pineda's
25 bias argument based on Rule 7007.1, we also reject his reversible
error argument based on Rule 7007.1.

26 ¹²For instance, on page 23 of his opening appeal brief,
27 Pineda stated: "The court's order prohibiting Appellant the right
28 to pursue relief for Appellees [sic] intentional violation of
11 U.S.C. § 362(a) constitutes an abuse of discretion and also
error, as a matter of law."

1 **CONCLUSION**

2 For the reasons set forth above, we AFFIRM.¹³

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24 ¹³On August 9, 2012, Pineda filed in the BAP Clerk's Office
25 a request to supplement the record. That request might be more
26 properly characterized as a notice of supplemental authorities.
27 Regardless of how we characterize it, we hereby DENY that
28 request. The supplemental authority cited in the request is
irrelevant to both the arguments in Pineda's opening brief and to
our analysis and disposition of this appeal.