

NOV 10 2014

NOT FOR PUBLICATION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

In re:) BAP No. CC-13-1572-TaSpD
)
 6 YAN SUI,) Bk. No. 11-20448-CB
)
 7 Debtor.)
)
 8 _____)
 9 YAN SUI; PEI-YU YANG,)
)
 10 Appellants,)
)
 11 v.) MEMORANDUM*
)
 12 RICHARD A. MARSHACK, Chapter 7)
 13 Trustee,)
)
 14 Appellee.)

Argued and Submitted on September 18, 2014
at Pasadena, California

Filed - November 10, 2014

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Yan Sui, appellant, argued pro se; Chad V. Haes of
Marshack Hays LLP argued for appellee Richard A.
Marshack, Chapter 7 Trustee.

Before: TAYLOR, SPRAKER** and DUNN, Bankruptcy Judges.

* This disposition is not appropriate for publication.
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.

** The Honorable Gary A. Spraker, Chief Bankruptcy Judge
for the District of Alaska, sitting by designation.

1 **INTRODUCTION**

2 Chapter 7¹ debtor Yan Sui and non-debtor Pei-yu Yang,² both
3 pro se, appeal jointly from an order that bars each of them from
4 filing "initiating documents" in the bankruptcy case without
5 advance review by the bankruptcy court and a determination that
6 such documents are meritorious. The order also requires Mr. Sui
7 and Ms. Yang to obtain leave from the bankruptcy court before
8 filing suit in any forum against the chapter 7 trustee, appellee
9 Richard A. Marshack, or his professionals. We determine that
10 entry of an order regulating certain aspects of the Appellants'
11 filings in the bankruptcy court is appropriate. We VACATE and
12 REMAND, however, for the bankruptcy court to modify the order
13 consistent with recent Ninth Circuit authority.

14 **FACTS³**

15 On July 27, 2011, Mr. Sui filed a bare-bones chapter 7
16 petition that listed a total of three creditors. When Mr. Sui
17 filed his schedules and statement of financial affairs, he
18 disclosed ownership of \$12,549.83 in personal property, no real
19 property or secured debt, unsecured debt totaling \$23,418.30, and
20

21 ¹ Unless specified otherwise, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 all "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure, Rules 1001-9037, and all "Civil Rule" references are
25 to the Federal Rules of Civil Procedure.

26 ² The record is unclear as to whether Ms. Yang is Mr. Sui's
27 current or former spouse.

28 ³ We exercise our discretion to take judicial notice of
documents electronically filed in the underlying bankruptcy case
and related adversary proceedings. See O'Rourke v. Seaboard Sur.
Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1989); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
392 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 one pending federal court lawsuit initiated by Mr. Sui.

2 As the case progressed, Mr. Sui paid certain creditors
3 directly and without leave of the bankruptcy court. In Mr. Sui's
4 mind, these payments resolved all bankruptcy issues and required
5 termination of the case. To say that he is fixated on this point
6 is, perhaps, an understatement. The impetus for Mr. Sui's
7 payments and the cause for his insistence on dismissal was likely
8 the fact that the Trustee identified a prepetition transfer from
9 Mr. Sui to Ms. Yang and initiated an adversary proceeding to set
10 it aside.

11 **Trustee's motion for pre-filing order.**

12 A little over two years later, Trustee filed his Motion for:
13 (1) Pre-Filing Order; and (2) Order Requiring Leave to Sue
14 Trustee Richard A. Marshack and his Professionals ("Motion"),⁴
15 seeking relief against Appellants. Without differentiating
16 between Mr. Sui and Ms. Yang, Trustee alleged that Appellants
17 "filed over 30 meritless pleadings, actions and appeals, nearly
18 all of which have been decided against them." Motion, Dkt. 17 at
19 8:4-5. He argued that such filings constituted an abuse of the
20 judicial process and evidenced the Appellants' intent to harass,
21 thus warranting a pre-filing order. In addition, Trustee alleged
22 that the Appellants repeatedly threatened to sue Trustee and his
23 professionals, thus warranting an order requiring Appellants to
24 seek leave from the bankruptcy court before filing such a suit in

25

26 ⁴ The Trustee filed an earlier motion, barely two months
27 into the case, seeking an order requiring that Mr. Sui seek leave
28 from the bankruptcy court before filing suit against Trustee and
his professionals. The bankruptcy court denied the first motion
without prejudice.

1 any forum, including the bankruptcy court.

2 In support of the Motion, the Trustee first requested that
3 the bankruptcy court take judicial notice of 13 cases/appeals
4 that Trustee alleged were initiated by the Appellants against the
5 Appellants' homeowners association and other defendants in the
6 seven years prepetition.⁵ Trustee generally alleged that all were
7 adjudicated adversely to the Appellants, although Trustee also
8 alleged that postpetition he settled two of the actions on behalf
9 of the estate. Trustee did not specifically articulate if or how
10 any of the 13 identified matters were frivolous, harassing, or
11 without merit.

12 Next, Trustee asked the bankruptcy court to take judicial
13 notice of papers filed in the bankruptcy court by Mr. Sui and/or
14 Ms. Yang - nearly all of which the Trustee alleged were decided
15 against the Appellants. The few matters allegedly not decided
16 against them were appeals still pending. Trustee did not
17 articulate if or how any of the filings were frivolous,
18 harassing, or without merit.

19 As to Mr. Sui, the filings included Mr. Sui's initial
20 chapter 7 petition, which he subsequently converted to chapter 13
21 in January 2012, and Mr. Sui's two motions to dismiss his case
22 after he converted to chapter 13.⁶ Mr. Sui also opposed the

23
24 ⁵ The Trustee also alleged that the Superior Court of
25 California, County of Orange, found Mr. Sui a vexatious litigant
26 in 2011, and he argued that the bankruptcy court should adopt the
state court's findings. Indeed, the Trustee argued that the
state court's finding was binding on the bankruptcy court,
pursuant to 28 U.S.C. § 1728.

27 ⁶ The bankruptcy court denied dismissal and re-converted
28 the case to chapter 7. It also denied Mr. Sui's reconsideration
(continued...)

1 Trustee's motion for approval of settlement of four state court
2 lawsuits to which Mr. Sui was a party.⁷ And finally, Trustee
3 listed Mr. Sui's filed opposition to dismissal of a state court
4 lawsuit that he initiated against the Trustee postpetition, after
5 removal by the Trustee.⁸

6 As to Ms. Yang, Trustee identified Ms. Yang's two motions to
7 dismiss the adversary proceeding Trustee filed against her to
8 avoid and recover as an alleged fraudulent conveyance the
9 transfer by Mr. Sui of his interest in a residential property.⁹
10 In addition, Trustee filed a second adversary proceeding against
11 Ms. Yang seeking to sell the real property that she co-owned with
12 the estate, the Trustee having prevailed in his fraudulent
13 conveyance action. Ms. Yang responded with a motion to dismiss
14 the complaint (and a subsequent amended motion to dismiss), and

15
16 ⁶(...continued)
17 motion. Mr. Sui appealed to the BAP. The BAP affirmed
18 re-conversion but dismissed as interlocutory a related appeal
19 from an order awarding administrative fees to Trustee and his
20 counsel in the chapter 13 case upon reconversion. Mr. Sui then
21 appealed to the Ninth Circuit. As of the date of the Motion, the
22 appeal remained pending.

23 ⁷ The bankruptcy court overruled the opposition and Mr. Sui
24 appealed to the BAP. The BAP dismissed the appeal based on
25 mootness, and Mr. Sui appealed to the Ninth Circuit. As of the
26 date of the Motion, the appeal remained pending.

27 ⁸ The bankruptcy court overruled Mr. Sui's opposition.
28 Mr. Sui appealed to the district court, which affirmed. Mr. Sui
29 appealed to the Ninth Circuit. As of the date of the Motion, the
30 appeal remained pending.

31 ⁹ The bankruptcy court denied the first motion. Ms. Yang
32 appealed to the district court, which affirmed. Ms. Yang filed a
33 second motion to dismiss, which as of the date of the Motion, was
34 set for hearing. In addition, Ms. Yang appealed to the Ninth
35 Circuit from a district court order adopting the bankruptcy
36 court's report and recommendation granting summary judgment in
37 favor of Trustee. As of the date of the Motion, the appeal
38 remained pending.

1 Mr. Sui filed a motion to intervene.¹⁰

2 The Trustee also asked the bankruptcy court to take judicial
3 notice of six state court actions or appeals filed by the
4 Appellants postpetition, which Trustee alleged were all without
5 merit. Of the six matters: the Trustee settled two; the Ninth
6 Circuit dismissed one appeal for lack of jurisdiction; and three
7 appeals filed with the Ninth Circuit remained pending as of the
8 date of the Motion. Again, Trustee did not articulate if or how
9 any of the matters was frivolous, harassing, or without merit.

10 Trustee brought his request for a general pre-filing order
11 under § 105(a), 28 U.S.C. § 1651(a), and Ninth Circuit case law
12 authority, alleging that it was warranted by Appellants'
13 repetition of non-meritorious legal arguments and persistence in
14 pursuing claims regardless of their lack of merit. Trustee also
15 sought a provision in the pre-filing order requiring leave to
16 file suit against the Trustee and his professionals under
17 § 105(a) and based on quasi-immunity under the Barton doctrine.
18 Trustee argued for a preemptive order to discourage frivolous
19 litigation by Appellants and to save the estate unnecessary
20 expense that would be incurred to respond.

21 **Opposition to the Motion.**

22 Mr. Sui filed written opposition to the Motion.¹¹ The record

23
24 ¹⁰ As of the date of the Motion, both Ms. Yang's amended
25 motion to dismiss and Mr. Sui's motion to intervene had not yet
been heard by the bankruptcy court.

26 ¹¹ We are cognizant of our obligation to "make reasonable
27 allowances for pro se litigants and . . . [to] construe pro se
28 papers and pleadings liberally." In re Kashani, 190 B.R. 875,
883 (9th Cir. BAP 1995). Mr. Sui misdirected much of his
opposition to argument that the Trustee's settlement of

(continued...)

1 does not include a written opposition filed by Ms. Yang.¹²
2 Mr. Sui first argued that the bankruptcy court lacked
3 jurisdiction to rule on the Motion. He generally argued that the
4 Motion was meritless, factually and legally unfounded, and a
5 waste of time. He more specifically argued that Trustee failed
6 to show that the state courts required him to seek pre-filing
7 approval of litigation, or that his suits against civil
8 defendants were frivolous, and that the bankruptcy court could
9 not consider Mr. Sui's state court actions against the civil
10 defendants.

11 As to Trustee's request to require pre-filing leave of court
12 to sue Trustee or his professionals, Mr. Sui argued that the
13 Barton doctrine did not apply to Trustee's actions because
14 Trustee acted outside the scope of his duties and violated
15 constitutionally protected property rights. In his declaration
16 in support of opposition, Mr. Sui disclosed that he and Ms. Yang
17 filed an action against Trustee and his professionals in the
18 district court that very same day.

19 **The bankruptcy court's findings, conclusions, and order.**

20 Neither Mr. Sui nor Ms. Yang appeared at the hearing on the
21 Motion on November 12, 2013. After hearing from counsel for the
22

23 ¹¹ (...continued)
24 litigation originally initiated by Mr. Sui was improper. We were
25 able to discern specific arguments made by Mr. Sui, however, that
26 addressed the relief requested in the Trustee's Motion, and we
27 summarize them accordingly.

28 ¹² We note, however, that upon issuance of the Pre-Filing
Order, the bankruptcy court stated in its conclusions of law that
Ms. Yang opposed the Motion. This conclusion is important to our
determination that Ms. Yang did not waive her right to appeal, as
discussed below.

1 Trustee, the bankruptcy court granted the Motion and stated its
2 grounds for doing so on the record. The bankruptcy court did not
3 articulate the legal grounds upon which it based its ruling, but
4 likened the applicable analysis to that required when restricting
5 petition filings by a serial filer.

6 The bankruptcy court stated that: "given the egregious
7 nature of the filings over and over, the same arguments, they've
8 lost on appeal at every level, we've got to stop it . . . there's
9 not going to be any money left for anyone . . . it's an abuse of
10 the system." Hr'g Tr. (Nov. 12, 2013) at 14:18-23. The
11 bankruptcy court also found "both Yang and Sui are vexatious in
12 the scheme of this bankruptcy case; that they have participated
13 together to file all these different pleadings . . . and they're
14 obviously acting in concert." Id. at 16:10-15. "So I will find
15 that both of them have been involved in the tremendous amount of
16 work that has been required by the Court and by the trustee in
17 this matter." Id. at 16:16-18.

18 Trustee lodged a proposed form of order and findings of fact
19 and conclusions of law, and filed notice of lodgment on
20 November 14, 2013. Appellants filed a notice of appeal to the
21 BAP on November 27, 2013 and a motion for leave to appeal. The
22 bankruptcy court entered the order granting the Motion on
23 December 19, 2013 (the "Pre-Filing Order"), along with the
24 separate Findings of Fact and Conclusions of Law ("FF&CL")
25 prepared by Trustee's counsel.¹³

26
27 ¹³ Appellants' notice of appeal filed after announcement of
28 the bankruptcy court's decision, but before entry of the order,
is treated as filed after such entry and on the day thereof. See
(continued...)

1 In the FF&CL, the bankruptcy court specifically concluded
2 that both Mr. Sui and Ms. Yang were vexatious litigants who,
3 since late 2009 either individually or jointly filed at least "37
4 meritless actions, appeals, motions, and other papers," all of
5 which were "frivolous," "harassing," and "abusive," and most of
6 which were "repetitive." FF&CL, Dkt. 17 at 10. The bankruptcy
7 court also found that both Appellants opposed the Motion, but
8 that the written opposition contained: "only irrelevant factual
9 assertions," "irrelevant legal arguments," "unintelligible legal
10 arguments," and "conclusory statements of law." Id. at 11. The
11 bankruptcy court determined that "[e]ach of the four elements
12 required for entry of a pre-filing order against the [Appellants]
13 have been met by the Trustee pursuant to the Motion"; and that
14 the proposed order was sufficiently narrow to address the
15 Appellants' abuses but to allow them to be heard. Id. Because
16 Appellants failed to appear at the hearing on the Motion the
17 bankruptcy court deemed them to consent to the relief sought in
18 the Motion. Id. at 12.

19 The bankruptcy court also specifically found that "[t]he
20 clear and present danger of needless litigation by the
21 [Appellants] warrants a preemptory order requiring that the
22 [Appellants] obtain leave of the Court before filing suit against
23 the Trustee and his professionals." Id. at 11.

24 The Pre-Filing Order provides, in part, as follows:

25 2. The Clerk of the Bankruptcy Court for the
26 Central District of California will accept no further
initiating documents for filing from Yan Sui ("Sui") or

27
28 ¹³(...continued)
Rule 8002(a).

1 Pei-Yu Yang ("Yang") in this case, including but not
2 limited to complaints, motions and objections to
3 claims. Any pleadings received from Sui and Yang shall
4 be stamped received after which time they will be
5 forwarded to the Court for review. If in fact the
6 pleadings are deemed meritorious, they will be returned
7 to the Clerk for filing, after which time either Sui or
8 Yang shall cause the same to be served upon attorneys
9 for the Trustee, Richard A. Marshack, all creditors,
10 and the United States Trustee. If after review, the
11 pleadings are not found to be meritorious, the same
12 shall be returned to Sui or Yang, shall not be filed of
13 record, and the receipt copy shall be removed from the
14 court file.

15 3. It is further ordered that this Order shall
16 not apply to any pleadings presented by Sui or Yang
17 designated as an "appeal" of any of this Court's Orders
18 whether such appeal be directed to the United States
19 District court, the Bankruptcy Appellate Panel, or the
20 Ninth Circuit Court of Appeals.

21 4. It is further ordered that Sui and Yang are
22 required to obtain leave of this Court before filing
23 suit in this Court or in any other forum against the
24 Trustee and or professionals hired by the Trustee for
25 acts regarding administration of the bankruptcy case.

26 5. It is further ordered that if Sui or Yang
27 disobey this Order and the instructions contained in
28 this Order, he or she will be subject to immediate
sanctions and will be ordered to appear to show cause
why he or she should not be held in contempt of this
Court's Orders.

19 Id. at 2.

20 JURISDICTION

21 The bankruptcy court had jurisdiction under 28 U.S.C.
22 §§ 1334 and 157(b) (2) (A) and (O). On appeal, Appellants include
23 an argument titled "Bankruptcy Court Lacks Jurisdiction to Make
24 the Order." Appellants argue, as they repeatedly argued before
25 the bankruptcy court, that because Mr. Sui allegedly paid his
26 creditors within the initial months of the chapter 7 case, no
27 adjustment of the debtor-creditor relationship remained for the
28 bankruptcy court to restructure. Mr. Sui believes that his

1 payment of creditors mooted the chapter 7 case, the estate ceased
2 to exist, Trustee's actions became "irrelevant" to the case, and
3 the bankruptcy court lost all jurisdiction to act. We disagree.
4 Even assuming, for the sake of argument only, that Mr. Sui paid
5 all his prepetition debts, until such time as the bankruptcy case
6 is dismissed or closed, the estate continues to exist, and the
7 bankruptcy court's jurisdiction continues. See §§ 349, 350, and
8 541.

9 We have jurisdiction under 28 U.S.C. § 158.¹⁴

10 **ISSUE**

11 Whether the bankruptcy court abused its discretion when it
12 granted the Motion and entered the Pre-Filing Order.¹⁵

13 **STANDARD OF REVIEW**

14 We review for an abuse of discretion a bankruptcy court's
15 decision to issue pre-filing orders. See Ringgold-Lockhart v.
16 Cnty. of Los Angeles, 761 F.3d 1057, 1062 (9th Cir. 2014)
17 (district court's compliance with procedural and substantive
18 standards for issuance of pre-filing restrictions against

19
20 ¹⁴ On February 19, 2014, the Panel entered an order denying
21 Appellants' Motion for Leave to Appeal, which was opposed by
22 Trustee. The Panel based denial on its conclusion that the order
23 on appeal is final, thus leave to appeal was unnecessary.
24 Notwithstanding, the Panel also granted leave to appeal, to the
25 extent necessary.

26 ¹⁵ As discussed below, on appeal Appellants raise a number
27 of arguments, including unsupported factual allegations, not
28 raised before the bankruptcy court. We recognize that Appellants
represent themselves pro se; nonetheless we decline to address
arguments and off-record factual allegations not presented to the
bankruptcy court. See Samson v. Western Capital Partners, LLC
(In re Blixseth), 684 F.3d 865, 872 n.12 (9th Cir. 2012)
(appellate court may decline to address argument not raised
before bankruptcy court) (citation omitted). Our consideration
of this appeal is also limited, as discussed later herein, based
on Appellants' deemed waiver and consent.

1 vexatious litigants reviewed for abuse of discretion); see Moy v.
2 United States, 906 F.2d 467, 469 (9th Cir. 1990) (district
3 court's order restricting filing of meritless claims reviewed for
4 abuse of discretion); and see Richardson v. Melcher
5 (In re Melcher), 2014 Bankr. LEXIS 1586 at *28 (9th Cir. BAP
6 Apr. 11, 2014) (bankruptcy court's sanctions order in the form of
7 a bar to filings reviewed for abuse of discretion). A bankruptcy
8 court abuses its discretion if it applied the wrong legal
9 standard or its findings are illogical, implausible, or without
10 support in the record. TrafficSchool.com, Inc. v. Edriver Inc.,
11 653 F.3d 820, 832 (9th Cir. 2011).

12 DISCUSSION

13 Before we discuss the Pre-Filing Order, we must address two
14 preliminary issues.

15 **A. Trustee's motion to strike documents.**

16 Trustee objects to Appellants' excerpts numbered 6-a, 6-b,
17 6-c, 6-d, 6-e, 7 through 9, and 10-a and 10-b as unrelated to the
18 appeal and not presented to, or considered by, the bankruptcy
19 court when it ruled on the Motion. The proper record in this
20 appeal consists of papers and exhibits filed and considered by
21 the bankruptcy court in connection with its ruling on the Motion,
22 along with the Pre-Filing Order and the FF&CL. See Barcamerica
23 Int'l USA Trust v. Tyfield Imps., Inc., 289 F.3d 589, 593-94 (9th
24 Cir. 2002); Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077
25 (9th Cir. 1988).

26 Trustee himself included excerpt number 8 in a judicial
27 notice request in support of the Motion and in his supplemental
28 excerpts of record on appeal. We determine, however, that other

1 than excerpt number 8 none of the documents to which Trustee
2 objects are included among the documents of which the bankruptcy
3 court took judicial notice or which it considered in connection
4 with its ruling on the Motion and issuance of the Pre-Filing
5 Order. Therefore, we deny the motion to strike as to excerpt
6 number 8 and grant it as to the other documents.

7 **B. Ms. Yang's failure to file written opposition and**
8 **Appellants' failure to appear at the hearing on the Motion**
9 **do not constitute their waiver of all arguments on appeal.**

10 Trustee argues on appeal that we should disregard all
11 arguments in Appellants' opening brief because Appellants failed
12 to appear at the hearing held by the bankruptcy court on the
13 Motion.¹⁶ Further, Trustee argues that Ms. Yang should not be
14 allowed to participate in this appeal at all because she filed no
15 written opposition to the Motion. As to Mr. Sui, Trustee
16 contends that he did not properly raise any intelligible
17 arguments, and, therefore, none of his arguments on appeal should
18 be heard.¹⁷ In effect, Trustee argues that Appellants waived
19 their right to appeal. We disagree in part.

20 As to Ms. Yang, the bankruptcy court found that she opposed
21 the Motion. We were not able to locate a written opposition

22 ¹⁶ The bankruptcy court itself, pursuant to local
23 bankruptcy rule, held the Appellants' nonappearance to be deemed
24 consent to the relief requested in the Motion. In the FF&CL, the
25 bankruptcy court also found that Yang did not file opposition to
the Motion, but then inconsistently held that both Appellants
opposed the Motion.

26 ¹⁷ Trustee argues that Mr. Sui's opposition "contained only
27 irrelevant factual assertions and legal arguments, unintelligible
28 legal arguments, and conclusory statements of law. . . ." Appellee's Brief at 4. The FF&CL contained the same assessment of Mr. Sui's written opposition. We reached a different conclusion, as summarized above.

1 filed by or on behalf of Ms. Yang but defer to the bankruptcy
2 court and its superior knowledge of the case; in its view,
3 opposition existed. This determination also is consistent with
4 its conclusion that Mr. Sui and Ms. Yang acted in concert
5 throughout the case. Mr. Sui filed written opposition; the
6 Trustee cannot credibly assert that Appellants jointly filed all
7 documents except the opposition.

8 The problem, however, is that neither Mr. Sui nor Ms. Yang
9 appeared at the final hearing. Pursuant to Rule 9013-1(j) of the
10 Local Rules of the United States Bankruptcy Court for the Central
11 District of California, a pro se party's failure to appear at a
12 properly noticed hearing, unless excused by the court in advance,
13 may be deemed consent to an adverse ruling on the matter being
14 heard. The bankruptcy court was entitled to exercise its
15 discretion to find waiver and consent; and it did so.

16 This determination, however, does not end the inquiry. The
17 right of access to the courts is one of constitutional origin,
18 and the Trustee bore a heavy burden. Similarly, the bankruptcy
19 court's discretion to bar access has limits even in the absence
20 of opposition. And finally, the Ninth Circuit issued its opinion
21 in Ringgold-Lockhart subsequent to the entry of the Pre-Filing
22 Order, which requires us to review the Pre-Filing Order using
23 metrics not available to the bankruptcy court at the hearing.

24 We, thus, conclude that Appellants waived their right to
25 argue that a pre-filing order is not appropriate, and we consider
26 only whether the content of the order is appropriate.

27 **C. Ninth Circuit standard for issuance of a pre-filing order.**

28 Given the constitutional underpinnings of the general right

1 to court access, "'pre-filing orders should rarely be filed,' and
2 only if courts comply with certain procedural and substantive
3 requirements." Ringgold-Lockhart v. Cnty. of Los Angeles,
4 761 F.3d at 1062 (quoting De Long v. Hennessey, 912 F.2d 1144,
5 1147 (9th Cir. 1990)). "Courts should not enter pre-filing
6 orders with undue haste because such sanctions can tread on a
7 litigant's due process right of access to the courts." Molski v.
8 Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007)
9 (internal citation omitted). Nonetheless, "[f]ederal courts can
10 'regulate the activities of abusive litigants by imposing
11 carefully tailored restrictions under . . . appropriate
12 circumstances.'" Ringgold-Lockhart, 761 F.3d at 1061 (citation
13 omitted). "Pursuant to the All Writs Act, 28 U.S.C. § 1651(a),
14 'enjoining litigants with abusive and lengthy [litigation]
15 histories is one such . . . restriction' that courts may impose."
16 Id. (citation omitted); and see In re Melcher, 2014 WL 141235 at
17 *9 (the All Writs Act applies to bankruptcy courts as Article I
18 courts, by its terms).

19 Before issuing a pre-filing injunction "it is incumbent on
20 the court to make 'substantive findings as to the frivolous or
21 harassing nature of the litigant's actions.'" Id. at 1064. This
22 requires review of both the number and content of the litigant's
23 claims - to determine whether frivolous - or the alternate
24 finding that the filings "'show a pattern of harassment.'" Id.
25 "Litigiousness alone is not enough," the claims also must be
26 meritless. Id. (quoting Molski, 500 F.3d at 1059 (citation
27 omitted)). Moreover, use of pre-filing orders against pro se
28 litigants should be approached with particular caution. See

1 Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980) (cited
2 with approval in De Long, 912 F.2d at 1147).

3 In Ringgold-Lockhart, the Ninth Circuit reviewed a district
4 court's order declaring Ringgold and her son Ringgold-Lockhart
5 vexatious litigants and imposing a pre-filing order. 761 F.3d at
6 1061. The District Court based its order primarily on law and
7 motion practice in two cases. Id.

8 The Circuit initially noted that "two cases is far fewer
9 than what other courts have found 'inordinate.'" Id. at 1064-65
10 (citing e.g., Molski, 500 F.3d at 1060; Wood v. Santa Barbara
11 Chamber of Commerce, Inc., 705 F.2d 1515, 1523, 1526 (9th Cir.
12 1983); In re Oliver, 682 F.2d 443, 444 (3d Cir. 1982);
13 In re Green, 669 F.2d 779, 781, 215 U.S. App. D.C. 393 (D.C. Cir.
14 1981) (per curiam)). Although it criticized the district court's
15 assessment of certain filings as baseless or frivolous, the
16 Circuit found "[m]ost troubling" that the list of vexatious
17 filings included the Ringgolds' response to the district court's
18 tentative order finding them vexatious, a response for which
19 Ringgold had a due process right to be heard.¹⁸ Id. at 1065.

20 Of particular importance here, the Circuit found error in
21 the district court's failure to consider alternative sanctions as
22 to Ringgold, such as costs or fees pursuant to Civil Rule 11.
23 Id. In addition, the court held that the district court failed
24

25 ¹⁸ The Ninth Circuit declined to decide whether "a
26 litigant's motions practice in two cases could ever be so
27 vexatious as to justify imposing a pre-filing order against a
28 person." 761 F.3d at 1065. The Court opined, however, that
"[s]uch a situation would at least be extremely unusual, in light
of the alternative remedies available to district judges to
control a litigant's behavior in individual cases." Id.

1 to tailor the order narrowly to the problem before it. Id. at
2 1066. The court found the screening order "unworkable" because
3 it provided for review of pleadings for merit -- reasoning that
4 "courts cannot properly say whether a suit is 'meritorious' from
5 pleadings alone." Id. And it found the breadth of the
6 restrictions unjustified - risking extension to "factual
7 scenarios entirely unrelated to the dispute" at issue. Id. at
8 1067.

9 In Ringgold-Lockhart, the Ninth Circuit set out a very clear
10 roadmap that emphasizes the careful review a court must conduct
11 before restricting such important constitutional rights to court
12 access, especially in cases involving pro se litigants. Prior to
13 issuance of a pre-filing order, the bankruptcy court was required
14 to: "(1) give litigants notice and 'an opportunity to oppose the
15 order before it [is] entered'; (2) compile an adequate record for
16 appellate review, including 'a listing of all the cases and
17 motions that led the [bankruptcy] court to conclude that a
18 vexatious litigant order was needed'; (3) make substantive
19 findings of frivolousness or harassment; and (4) tailor the order
20 narrowly so as 'to closely fit the specific vice encountered.'" Id.
21 at 1062 (citing De Long, 912 F.2d at 1147-48).

22 Because Appellants here are deemed to have consented to
23 issuance of some form of pre-filing order,¹⁹ we necessarily focus

24
25 ¹⁹ We note in passing that Appellants do not question
26 notice and the opportunity for hearing or the adequacy of the
27 record made available to the bankruptcy court. On appeal,
28 however, Mr. Sui argues that Trustee failed to support his Motion
with anything more than conclusory statements that the bankruptcy
court accepted without question. As Mr. Sui is deemed to have
waived this argument by failing to appear at the hearing on the
(continued...)

1 our review on whether the relief provided in the Pre-Filing Order
2 comports with the standards articulated in Ringgold-Lockhart.²⁰

3 **D. Contrary to Ringgold-Lockhart, the Pre-Filing Order**
4 **improperly requires a merits review by the bankruptcy court.**

5 On its face, the Pre-Filing Order fails to comport with
6 Ringgold-Lockhart because it provides that Appellants cannot file
7 initiating documents unless the bankruptcy court reviews them and
8 finds them to be meritorious. As the Ninth Circuit determined,
9 such relief is "in fact unworkable." 761 F.3d at 1066. The
10 bankruptcy court cannot properly determine merit in all cases
11 from an initiating document. See id. Our adversarial system
12 requires both input from the opposing party and an opportunity
13 for the plaintiff or movant to respond to any argument that the
14 request for relief lacks merit. Because the Pre-Filing Order
15 requires merits review, it is not narrowly tailored and
16 modification is appropriate. See id.

17 **E. The bankruptcy court's failure to make sufficient**
18 **substantive findings as to the specific frivolous or**
19 **harassing nature of Appellants' actions hampers our review**
20 **of the problem before it, and thus, of the appropriate**
21 **tailoring of the Pre-Filing Order.**

22 Here, the bankruptcy court found the Appellants to be
23 vexatious primarily on the basis of their motion practice and
24 related appeals in the bankruptcy case, but it also "[took] note

25 ¹⁹(...continued)
26 Motion, we consider this argument solely in the context of the
27 adequacy of the findings regarding the "specific vice
28 encountered," and, thus, whether the Pre-Filing Order was
narrowly tailored to fit.

²⁰ The Trustee requested judicial notice of 54 documents,
which the bankruptcy court granted. We base our review of the
merits of the content of the bankruptcy court's order on these
documents to the extent possible. See id. at 1064.

1 of the tremendous amount of litigation not only in federal court
2 but also in state court." Hr'g Tr. (Nov. 12, 2013) at 18:21-23.
3 At the hearing, the bankruptcy court stated that it was "used to
4 doing this in bankruptcy petition filings" and "given the
5 egregious nature of the filings over and over, the same
6 arguments, they've lost on appeal at every level, we've got to
7 stop it . . . [or] there's not going to be any money left for
8 anyone." Id. at 14:12-23. Neither in its oral ruling, nor in
9 the FF&CL, however, did the bankruptcy court identify or discuss
10 what filings were made "over and over," or what the "same
11 arguments" consisted of.

12 The FF&CL²¹ contains blanket findings that Appellants'
13 filings, defined to include all of the papers identified in the
14 Motion, were "frivolous," "harassing," and "abusive," and most
15 were "repetitive." FF&CL, Dkt. #17 at 10. Yet, neither the
16 Trustee nor the bankruptcy court articulated any basis to reach
17 such global conclusions. Our review of the record provides no
18 enlightenment.

19 The only argument we found that was repeated by Appellants
20 unsuccessfully in multiple documents filed in the bankruptcy
21 court, and again in this appeal, is the argument that Mr. Sui's
22 payment of allegedly all his creditors within the first few
23 months after he filed bankruptcy legally resulted in the
24 bankruptcy court's loss of jurisdiction, Trustee's lack of

25
26 ²¹ The filed FF&CL reflects very few, and primarily
27 non-substantive, revisions to the initial form of FF&CL prepared
28 by Trustee's counsel and lodged with the bankruptcy court. The
FF&CL also contains internal inconsistencies, such as the factual
finding that Ms. Yang did not file any opposition versus the
legal conclusion that both Appellants opposed the Motion.

1 standing, and the cessation of the chapter 7 estate. Let it
2 suffice to say that Appellants' argument lacks legal merit. And
3 after oral argument before the Panel we acknowledge Mr. Sui's
4 fixation on this point. Nonetheless, we conclude that Mr. Sui's
5 repetition of this one non-meritorious argument does not warrant
6 the global restrictions contained in the Pre-Filing Order. Nor
7 does the balance of the record do so. We acknowledge that the
8 bankruptcy court may have knowledge or other support for its
9 conclusions based on its experience with the case; however, our
10 review is necessarily limited to the specific findings and record
11 in this appeal.

12 While we question the adequacy of the findings to support
13 the relief provided by the Pre-Filing Order, given the
14 Appellants' waiver of issues below, we do not question that some
15 form of relief is appropriate. On remand, the bankruptcy court
16 must take the following into account.

17 **F. The Pre-Filing Order does not narrowly address the only**
18 **problem evident on this record.**

19 The Appellants initiated little before the bankruptcy court.
20 They did not file any adversary proceedings, and between them
21 they filed few motions. Instead, they exercised their due
22 process rights and opposed motions, sought reconsideration of
23 rulings, and appealed. And they did so on far fewer occasions
24 than is often the case with highly litigious pro se filers.

25 Based on our review the problem is not the numerosity of the
26 Appellants' filings, it is Mr. Sui's fixation on his alleged
27 payment of all creditors, his erroneous view of the status of
28 this case as a result, and the threat of litigation against the

1 Trustee in other courts. There may be other arguments that he
2 repeats, but we cannot identify them from the record before us.
3 Thus, from our vantage point, the Pre-Filing Order is not
4 narrowly tailored, as required by Ninth Circuit authority, to
5 address the "specific vice encountered."²²

6 **G. Leave required to file suit against Trustee and his**
7 **professionals.**

8 The Barton doctrine, as applied in the Ninth Circuit,
9 "requires 'that a party must first obtain leave of the bankruptcy
10 court before it initiates an action in another forum against a
11 bankruptcy trustee or other officer appointed by the bankruptcy
12 court for acts done in the officer's official capacity.'" Harris v. Wittman (In re Harris), 590 F.3d 730, 741 (9th Cir.
13 2009) (quoting In re Crown Vantage, Inc., 421 F.3d 963, 970 (9th
14 Cir. 2005)). Without leave from the bankruptcy court, as the
15 court that appointed the trustee, "the other forum lack[s]
16 subject matter jurisdiction over the suit." Id. (citation
17 omitted). Thus, in the Ninth Circuit, even without the Pre-
18 Filing Order, Appellants must obtain leave of the bankruptcy
19 court before filing lawsuit against the Trustee and his
20 professionals for acts done in their official capacities or be
21 subject to dismissal for lack of subject matter jurisdiction.
22

23
24 ²² The bankruptcy court may want to consider barring
25 Mr. Sui (or Ms. Yang) from repeating the arguments they
26 unsuccessfully asserted at all levels of litigation and to
27 establish a coercive monetary sanction if they violate the order.
28 In so doing, Appellants' rights of access to the court remain
unfettered; they have already had a full and fair opportunity to
present these arguments. It is plainly inappropriate, vexatious,
and harassing for arguments to be repeated without cessation. On
remand, the bankruptcy court can consider modification in this
regard.

1 Thus, at least in part, the provision in the Pre-Filing Order is
2 duplicative of existing law.

3 Moreover, the leave requirement in the Pre-Filing Order, in
4 effect, turns violation of the Barton doctrine into contempt of
5 court and places the bankruptcy court in the position of
6 sanctioning the Appellants for actions they take before another
7 court. We question the propriety of such relief on this record.

8 When the bankruptcy court entered the Pre-Filing Order here,
9 Appellants already had an action pending against the Trustee and
10 his professionals in district court. During the pendency of this
11 appeal, that action was dismissed by the district court for lack
12 of subject matter jurisdiction based on the Barton doctrine. See
13 Yan Sui et al. v. Marshack et al., 2014 U.S. Dist. LEXIS 100590
14 at *10, *18 (C.D. Cal. June 20, 2014), rep. and recom. accepted
15 Yan Sui v. Marshack, 2014 U.S. Dist. LEXIS 100520 (C.D. Cal.
16 July 23, 2014). The magistrate judge's recommendations, adopted
17 by the district court, included dismissal of Appellants' claims
18 against Trustee and his professionals in their entirety without
19 prejudice to Appellants' ability to refile the claims, "provided
20 [Appellants] first obtain written leave to do so from the
21 Bankruptcy Court. . . ." Arguably, if Appellants fail to seek
22 leave from the bankruptcy court before filing another such action
23 in the district court, they will be in contempt of the district
24 court's dismissal order.

25 Of course, any action filed in the bankruptcy court would
26 not require such advance approval under the Barton doctrine, but
27 the effect of the Pre-Filing Order is to require that the
28 bankruptcy court potentially conduct two reviews of the same

1 pleadings. The bankruptcy court should consider alternative and
2 less judicially inefficient means to address the possibility that
3 Appellants might, in the future, file frivolous or harassing
4 claims against the Trustee and his professionals.

5 **CONCLUSION**

6 For the foregoing reasons, we VACATE the Pre-Filing Order
7 and REMAND for further proceedings consistent with this
8 Memorandum.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28