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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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|--------------------------|---|-------------------------------|------------------|
| In re:                   | ) | BAP No.                       | CC-14-1028-KiTad |
|                          | ) |                               |                  |
| JAMES L. GERARD, Jr. and | ) | Bk. No.                       | 10-13508-GM      |
| JULIE S. GERARD,         | ) |                               |                  |
|                          | ) | Adv. No.                      | 1:10-1261        |
| Debtors.                 | ) |                               |                  |
| _____                    | ) |                               |                  |
| DIANE GOLDMAN,           | ) |                               |                  |
|                          | ) |                               |                  |
| Appellant,               | ) |                               |                  |
|                          | ) |                               |                  |
| v.                       | ) | <b>MEMORANDUM<sup>1</sup></b> |                  |
|                          | ) |                               |                  |
| JULIE S. GERARD,         | ) |                               |                  |
|                          | ) |                               |                  |
| Appellee.                | ) |                               |                  |
| _____                    | ) |                               |                  |

Argued and Submitted on October 23, 2014,  
at Malibu, California

Filed - December 8, 2014

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Appearances: Diane Goldman, appellant, argued pro se; Anthony Daniel Zinnanti argued for appellee, Julie S. Gerard.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

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<sup>1</sup> 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.

1           Creditor Diane Goldman ("Goldman") appeals an order granting  
2 the motion of debtor Julie S. Gerard ("Debtor") to reopen an  
3 adversary proceeding and determining that Debtor did not breach a  
4 settlement agreement related to a nondischargeability judgment  
5 entered previously in Goldman's favor. Two other issues raised in  
6 Debtor's motion were not (and still have not been) decided in the  
7 instant order. Because the order on appeal is not final, we  
8 DISMISS for lack of jurisdiction.

9                           **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10           Goldman and Debtor were law partners until November 2007.  
11 After termination of their partnership, Goldman sued Debtor in  
12 state court for breach of fiduciary duty, breach of written  
13 contract and other claims. In short, Goldman contended Debtor had  
14 taken funds in excess of her one-half share allowed under the  
15 partnership agreement.

16           After trial, the state court entered a judgment in favor of  
17 Goldman for \$93,354.46 plus interest, costs and attorney's fees.  
18 The amount of attorney's fees was to be determined at a later  
19 hearing, but that matter was taken off calendar once Debtor and  
20 her husband filed their chapter 7<sup>2</sup> bankruptcy case. Goldman  
21 incurred approximately \$147,000 in attorney's fees in the state  
22 court litigation.

23                           **A. The adversary proceeding**

24           Goldman timely filed a nondischargeability complaint seeking  
25 to except her debt of approximately \$240,000 (\$93,354.64 plus an

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26  
27           <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 estimated \$147,000 in fees and costs) from Debtor's discharge  
2 under § 523(a)(2)(A), (a)(4) and (a)(6).<sup>3</sup> The parties settled the  
3 matter at mediation.

4 A Settlement and Release Agreement ("Settlement Agreement")  
5 was executed in connection with the nondischargeability action.  
6 According to the Settlement Agreement, Debtor agreed to pay  
7 Goldman \$25,000 on or before March 1, 2011. She also agreed to  
8 assign to Goldman a beneficial interest of \$125,000 in her  
9 existing \$500,000 whole life insurance policy, as Debtor had just  
10 been diagnosed with Stage IV colon cancer. In lieu of the  
11 insurance interest, Debtor could also satisfy her obligation to  
12 Goldman if she paid Goldman \$85,000 or before March 1, 2016.  
13 Goldman would receive a nondischargeability judgment for \$240,000,  
14 reduced to \$215,000 upon Debtor's timely payment of \$25,000, which  
15 Goldman agreed not to enforce unless Debtor defaulted under the  
16 terms of the Settlement Agreement. Debtor could default by:  
17 (1) failing to "make any payment when the same shall become due;"  
18 (2) failing to "make any premium payment when due;" (3) the lapse  
19 of any coverage provided under the life insurance policy; or  
20 (4) breaching any other terms or conditions.

21 In Paragraph 3 of the Settlement Agreement, the parties  
22 agreed the bankruptcy court "would retain jurisdiction over the  
23 terms of the [Settlement Agreement] and its enforcement," and  
24 further agreed in Paragraph 17 that all actions or proceedings  
25 arising in connection with the Settlement Agreement would be  
26 "tried and litigated only in the Bankruptcy Court of the Central

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27  
28 <sup>3</sup> Goldman also plead § 727 claims against Debtor, but these  
claims were later dismissed.

1 District of California."

2       The bankruptcy court entered the parties' signed Stipulation  
3 for Judgment of Nondischargeability of Debt (the "Stipulation")  
4 and the Judgment for Nondischargeability of Indebtedness (the  
5 "Judgment") in February 2011. The Stipulation referenced the  
6 Settlement Agreement and set forth its essential terms. The  
7 parties agreed that Goldman was entitled to a nondischargeability  
8 judgment of \$240,000 under § 523(a)(2)(A), (a)(2)(B) and (a)(6),  
9 which was enforceable only if Debtor failed to comply with the  
10 terms of the Settlement Agreement. The Judgment stated that the  
11 court had approved the terms and content of the Stipulation.

12       Debtor made the initial \$25,000 payment to Goldman. She also  
13 executed an assignment of the beneficial interest in her life  
14 insurance policy to Goldman.

15       Debtor received a discharge, and the bankruptcy case was  
16 closed on March 1, 2011. The adversary proceeding was dismissed  
17 by a clerk's entry on November 19, 2012.

18 **B. Events leading to the motion to reopen the adversary**  
19 **proceeding**

20       On or about December 4, 2012, Goldman received a notice from  
21 New York Life that Debtor had failed to pay the policy premium due  
22 on November 3, 2012. To "keep the coverage in force," Debtor was  
23 to make the premium payment by no later than January 3, 2013. If  
24 payment was received by that date, New York Life would "promptly  
25 reinstate [Debtor's] coverage, provided all persons covered under  
26 the policy are living when payment is received." In addition to  
27 paying by cash, Debtor could also pay the premium via the  
28 company's Automatic Premium Loan ("APL") option (take out a loan

1 against the policy to make the payment) or the Default Premium  
2 Payment option, where the company would apply Debtor's dividend  
3 credits to pay the "overdue premium."

4 Counsel for Goldman, Susan L. Vaage ("Vaage"), sent a letter  
5 to Debtor's counsel concerning the nonpayment of the premium and  
6 advised counsel that Debtor was in default of the Settlement  
7 Agreement. Vaage claimed she heard nothing further from Debtor's  
8 counsel. Debtor eventually paid the premium on December 20, 2012,  
9 using the APL option.

10 Believing that Debtor had breached the Settlement Agreement,  
11 Goldman filed an abstract of judgment for \$240,000 ("Abstract"),  
12 which was recorded on January 17, 2013. The Abstract listed  
13 Debtor's home address incorrectly in both places on the form.  
14 Debtor claimed she never received notice of the Abstract.

15 Goldman received similar notices of Debtor's failure to pay  
16 the insurance premiums when due on July 3 and August 3 of 2013.  
17 The notices referenced a grace period and stated that failure to  
18 pay the premiums within 62 days "may result in your policy  
19 lapsing." The notices further explained that allowing the policy  
20 to lapse would result in no payment of death benefits. In  
21 response to the July notice, Vaage sent a letter to Debtor's  
22 counsel stating that Debtor's nonpayment of the premium was a  
23 default under the Settlement Agreement and entitled Goldman to the  
24 entire \$240,000 Judgment, less the \$25,000 received. Notably,  
25 Vaage made no mention of the Abstract recorded in January 2013.  
26 The July 3 premium was eventually paid by check on August 1, 2013,  
27 and the August 3 premium was paid on October 9, 2013, by the APL  
28 option. Both premiums appear to have been paid within the 62-day

1 grace period.

2 In December 2013, Debtor's counsel sent a letter to Vaage  
3 inquiring why the Abstract was recorded in January 2013, since  
4 Debtor's insurance premiums had always been maintained and were  
5 current. Apparently, Debtor was trying to sell her current home  
6 in Calabasas and purchase another one in Ojai and Goldman's lien  
7 was hindering that process. In reply, Vaage explained that Debtor  
8 had defaulted "when she allowed the premium payments to lapse" and  
9 Debtor only later reinstated the policy. Vaage explained that  
10 when she did not hear anything from Debtor or Debtor's counsel in  
11 response to her default notice letter in December 2012, she  
12 applied for the writ of execution and Abstract.

13 **C. Motion to reopen the adversary proceeding and related relief**

14 On January 9, 2014, Debtor filed her Ex Parte Motion to  
15 Reopen Adversary Proceeding to Interpret Court's Judgment and  
16 Settlement Agreement Incorporated Therein, To Rescind Unauthorized  
17 Issuance of Abstract of Judgment, and to Hold Diane Goldman in  
18 Contempt of Court (the "Motion"). Debtor requested that the  
19 Motion be heard on shortened notice because the escrows for the  
20 home sale and purchase were scheduled to close on January 20.

21 Debtor denied defaulting under the Settlement Agreement. She  
22 contended that the language "when due" with respect to premium  
23 payments was not defined and never specified that payment must be  
24 made when first due. She further denied the policy ever lapsed.  
25 Debtor also disputed whether taking loans against the policy  
26 constituted a default. Debtor contended the Abstract should be  
27 rescinded because: (1) she did not breach the Settlement  
28 Agreement; (2) the dollar amount was wrong and should be \$215,000

1 instead of \$240,000 due to her \$25,000 payment; and (3) it failed  
2 to state Debtor's correct address as required by California law.  
3 Finally, Debtor contended that Goldman should be held in contempt  
4 for secretly enforcing a judgment to which she was not entitled.

5 The bankruptcy court granted the order shortening time and  
6 set the Motion for hearing on January 14, 2014. Goldman could  
7 oppose the Motion orally at the hearing.

8 In her written opposition to the Motion, Goldman contended  
9 the bankruptcy court lacked jurisdiction to determine whether  
10 Debtor defaulted under the Settlement Agreement. She further  
11 argued that Debtor had breached the Settlement Agreement by:  
12 (1) taking out loans against the insurance policy that impaired  
13 Goldman from being paid first on the policy as the parties agreed;  
14 (2) allowing the policy to lapse in December 2012 for nonpayment  
15 of premium; and (3) failing to pay the premiums "when due" on at  
16 least three occasions. Even though Debtor eventually paid the  
17 premium after the December 2012 default and the policy was  
18 reinstated, Goldman argued that the Settlement Agreement did not  
19 contemplate such cures. Further, no benefits would have been paid  
20 to Goldman had Debtor died while the policy was not in effect.  
21 Thus, Goldman believed she was entitled to the nondischargeability  
22 judgment of \$240,000 because of Debtor's multiple defaults.

23 On the evening before the hearing, Debtor filed a declaration  
24 from her insurance agent, Cary Richman ("Richman"). Richman  
25 testified that Debtor's life insurance policy could not have  
26 lapsed because sufficient cash existed in December 2012 to make  
27 the payment via the APL option.

28 At the start of the hearing, the bankruptcy court expressed

1 its reluctance to decide anything other than how to get the  
2 escrows to close on time. Debtor's alleged breach of the  
3 Settlement Agreement, the propriety of the recorded Abstract or  
4 Goldman's alleged contempt could be decided at a later date. When  
5 counsel for the parties expressed a desire to have all matters  
6 raised in the Motion decided that day, the bankruptcy court agreed  
7 and accommodated them.

8 After hearing argument from the parties, the bankruptcy court  
9 ruled on the Motion. It granted relief to reopen the adversary  
10 proceeding and to interpret the Settlement Agreement and Judgment.  
11 The court found that the type of borrowing that occurred against  
12 the insurance policy – i.e., to pay premiums – was not the type of  
13 borrowing contemplated by the Settlement Agreement, so Debtor's  
14 loans to pay premiums were not a violation.

15 The court then considered whether Debtor allowed the policy  
16 to lapse. After carefully reviewing the evidence, the bankruptcy  
17 court stated that it could not make that determination based on  
18 what was before it; additional evidence was needed. Hr'g Tr.  
19 (Jan. 14, 2014) 40:24-47:16. It then went on to conclude that use  
20 of the term "reinstate" in the late payment notices could mean the  
21 policy lapsed, but that it could also mean the policy was only  
22 suspended unless the premium was paid by January 3, 2013, which it  
23 was. Id. at 47:18-48:14.

24 Ultimately, the bankruptcy court did not rule on whether or  
25 not the insurance policy lapsed. Vaage then reiterated that  
26 failure to make premium payments "when due" was also a default  
27 under the Settlement Agreement. On that issue, the court ruled:

28 THE COURT: Okay. All right. I'm just going to rule.

1 I'm going to rule that she has not breached the agreement  
2 and you're entitled to your \$85,000 and it's to be paid  
3 out of this escrow and it's over with. And if it's not  
4 paid out of the escrow, then we're going to go back and  
5 retool all of this to make sure that it gets -- that  
6 actually, I'm going to say if it's not paid out of the  
7 escrow, then you get your judgment for the . . . whole  
8 thing.

9 Id. at 49:8-16.

10 The bankruptcy court entered an order granting the Motion on  
11 January 16, 2014 ("Order"), which Goldman timely appealed. The  
12 Order included a finding that Debtor "did not breach the  
13 Settlement Agreement incorporated into this Court's Judgment  
14 entered in this adversary proceeding on February 8, 2011[.]" The  
15 Order directed that payment of \$85,000 to Goldman from the escrow  
16 would fully satisfy the Judgment. If the \$85,000 was not paid,  
17 Goldman was entitled to \$215,000, the \$240,000 Judgment minus the  
18 \$25,000 already paid.

19 **D. Events after entry of the Order and notice of appeal**

20 In her motion for stay pending appeal, Goldman contended that  
21 the alleged \$400,000 equity in Debtor's Calabasas home, which was  
22 being sold, was the only source of recovery to satisfy the  
23 Judgment should she prevail on appeal. Thus, a stay was needed to  
24 preserve the funds, particularly the \$130,000 balance that would  
25 be owed to her if she succeeded in reversing the Order.

26 Debtor responded within twenty-four hours with her emergency  
27 motion to: (1) issue an OSC for why Goldman should not be held in  
28 contempt for new actions which violated the Order; (2) enjoin  
29 Goldman to comply with the Order; (3) authorize others to act on  
30 Goldman's behalf to effectuate the home sale; (4) order the clerk  
31 to issue a certificate of satisfaction of the Judgment; and

1 (5) relieve Debtor of the Judgment under Civil Rule 60(b). Debtor  
2 contended that Goldman had violated the Order by recording a new  
3 abstract of judgment for \$215,000 and making a demand upon escrow  
4 for just over \$215,000, instead of the \$85,000 directed in the  
5 Order. Debtor simultaneously filed an adversary complaint seeking  
6 the same relief as in the emergency motion.

7 The bankruptcy court granted both parties' requests for a  
8 hearing on shortened time. At the January 24, 2014 hearing,  
9 Goldman agreed to withdraw her motion for stay pending appeal  
10 based on the following relief stipulated by the parties:

11 (1) Goldman would receive the \$85,000 cash payment from escrow;  
12 (2) Goldman would remove the new abstract of judgment for \$215,000  
13 on Debtor's Calabasas home to facilitate the sale; and (3) Goldman  
14 could then file a new abstract of judgment for \$130,000 on  
15 Debtor's new home in Ojai once the sale closed. The court entered  
16 an order approving the parties' stipulated relief that same day.

## 17 **II. JURISDICTION**

18 Goldman contends the bankruptcy court lacked jurisdiction to  
19 reopen the adversary proceeding and interpret the Judgment and  
20 Settlement Agreement. Debtor contends we lack jurisdiction to  
21 review the Order because the appeal is moot. We independently  
22 question whether the Order on appeal is final. These  
23 jurisdictional issues are addressed below.

## 24 **III. ISSUES**

25 1. Did the bankruptcy court have jurisdiction to reopen the  
26 adversary proceeding and interpret the Judgment and Settlement  
27 Agreement?

28 2. Is the Order final and appealable?

1 **IV. STANDARDS OF REVIEW**

2 We review de novo questions of subject matter jurisdiction.  
3 Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Wilshire  
4 Courtyard), 729 F.3d 1279, 1284 (9th Cir. 2013).

5 We review our own jurisdiction, including questions of  
6 finality, de novo. Silver Sage Partners, Ltd. v. City of Desert  
7 Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787  
8 (9th Cir. 2003).

9 **V. DISCUSSION**

10 **A. The bankruptcy court had jurisdiction to reopen the adversary**  
11 **proceeding and interpret the Judgment and Settlement**  
12 **Agreement.**

13 The bankruptcy court had exclusive jurisdiction over the  
14 particular nondischargeability claims at issue here. Rein v.  
15 Providian Fin. Corp., 270 F.3d 895, 904 (9th Cir. 2001) (bankruptcy  
16 courts have exclusive jurisdiction over nondischargeability  
17 actions brought under § 523(a)(2), (4) and (6)); § 523(c).  
18 Goldman disputes whether the bankruptcy court had subject matter  
19 jurisdiction to consider the Motion, which sought to reopen the  
20 adversary proceeding and to interpret the Judgment and Settlement  
21 Agreement. The bankruptcy court never addressed Goldman's  
22 concerns on this issue, but we can presume based on the record  
23 that the court believed it had jurisdiction. We must satisfy  
24 ourselves of the bankruptcy court's subject matter jurisdiction.  
25 Huse v. Huse-Sporssem, A.S. (In re Birting Fisheries, Inc.),  
26 300 B.R. 489, 497 (9th Cir. BAP 2003) (citing Arizonans For  
Official English v. Ariz., 520 U.S. 43, 73 (1997)).

27 Debtor contends that subject matter jurisdiction was  
28 conferred pursuant to § 105(a). However, § 105(a) does not confer

1 subject matter jurisdiction on the bankruptcy court.  
2 In re Birting Fisheries, Inc., 300 B.R. at 497. "'Subject matter  
3 jurisdiction and power are separate prerequisites to the court's  
4 capacity to act. Subject matter jurisdiction is the court's  
5 authority to entertain an action between the parties before it.  
6 Power under section 105 is the scope and forms of relief the court  
7 may order in an action in which it has jurisdiction.'" Id.  
8 (quoting Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am.  
9 Hardwoods, Inc.), 885 F.2d 621, 624 (9th Cir. 1989)).

10 We conclude, nonetheless, that the bankruptcy court had  
11 subject matter jurisdiction on the basis of statutory ("arising  
12 under") jurisdiction and/or ancillary jurisdiction.

13 The adversary proceeding involves the dischargeability of a  
14 debt. Such a proceeding "arises under" the Bankruptcy Code,  
15 because it is a cause of action created by § 523 and is a "core"  
16 proceeding the bankruptcy court may hear and determine. McCowan  
17 v. Fraley (In re McCowan), 296 B.R. 1, 3 (9th Cir. BAP 2003);  
18 28 U.S.C. § 157(b)(1), (b)(2)(I). The bankruptcy court also has  
19 jurisdiction to enter a money judgment that fixes the amount of  
20 the nondischargeable debt. In re McCowan, 296 B.R. at 3 (citing  
21 Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1017 (9th Cir.  
22 1997)).

23 It has been long settled that process in aid of and to  
24 effectuate an adjudication and order entered by a federal  
25 court may be enforced by that court "irrespective of  
26 whether the court would have jurisdiction if the  
27 proceeding were an original one" and that these  
28 principles apply in bankruptcy. Local Loan Co. v. Hunt,  
292 U.S. 234, 239-40 (1934); accord Thomas, Head &  
Greisen Emps. Trust v. Buster, 95 F.3d 1449, 1453-54 (9th  
Cir. 1996).

The rationale is that a federal court has "ancillary

1 enforcement jurisdiction" that is automatically available  
2 for use "in subsequent proceedings for the exercise of a  
3 federal court's inherent power to enforce its judgments."  
4 Peacock v. Thomas, 516 U.S. 349, 356 (1996). Accord  
5 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379-81  
6 (1994); Riggs v. Johnson Cnty., 73 U.S. (6 Wall.) 166,  
187 (1867). Such ancillary enforcement jurisdiction is  
7 regarded as fundamentally a creature of necessity.  
8 Peacock, 516 U.S. at 359; Kokkonen, 511 U.S. at 380;  
9 Riggs, 73 U.S. at 187.

10 Id. (holding that bankruptcy court does not lack jurisdiction to  
11 enforce its own money judgments after bankruptcy case is closed).

12 Accordingly, actions brought to effectuate a judgment entered  
13 in the prior suit are ancillary to the original action; they are  
14 in essence a continuation of the original suit. Id. at 4 (citing  
15 Lawson v. Tilem (In re Lawson), 156 B.R. 43, 46 (9th Cir. BAP  
16 1993); Jones v. Nat'l Bank of Commerce of El Dorado, 157 F.2d 214,  
17 215 (8th Cir. 1946)). Thus, where a proceeding is brought to  
18 effectuate a judgment entered by the bankruptcy court, the  
19 proceeding is a continuation of the original proceeding, and  
20 jurisdiction depends on whether the original proceeding was within  
21 the bankruptcy court's jurisdiction. Id. (citing Peacock,  
22 516 U.S. at 356).

23 The original proceeding to determine the dischargeability of  
24 a debt under § 523(a) (2) and (a) (6) was within the exclusive  
25 jurisdiction of the bankruptcy court, as was the Stipulation and  
26 Judgment entered regarding the debt. Therefore, Debtor's Motion,  
27 which sought to reopen the adversary proceeding and interpret the  
28 Judgment and related Settlement Agreement, continued to be a  
matter that "arises under" the Bankruptcy Code, and the bankruptcy  
court had jurisdiction to hear it. Id. at 5; In re Birting  
Fisheries, Inc., 300 B.R. at 499 (bankruptcy court's "core"

1 jurisdiction continues in order for it to enforce its orders, even  
2 after the case has been closed).

3 Two recent Ninth Circuit cases may arguably have impacted the  
4 holding of In re McCowan, the case upon which we rely heavily for  
5 our decision. In Sea Hawk Seafoods, Inc. v. Alaska (In re Valdez  
6 Fisheries Dev. Ass'n, Inc.), 439 F.3d 545 (9th Cir. 2006), the  
7 Ninth Circuit held that the bankruptcy court lacked jurisdiction  
8 to interpret a settlement agreement it had approved while the  
9 chapter 11 case was pending. The original adversary proceeding  
10 and settlement agreement was between debtor and one of its  
11 creditors. Id. at 547. After the chapter 11 case was dismissed,  
12 the creditor moved to reopen the bankruptcy case and filed an  
13 adversary proceeding against a third party, the State of Alaska,  
14 to have the bankruptcy court determine whether the settlement  
15 agreement released its fraudulent conveyance claim against Alaska.  
16 Id. The bankruptcy court determined it had jurisdiction over the  
17 second adversary proceeding as one "related to" the bankruptcy.  
18 The Ninth Circuit disagreed.

19 Valdez Fisheries is distinguishable on several important  
20 facts. First, the claim at issue was not one "arising under" the  
21 Bankruptcy Code but rather a state-law fraudulent conveyance claim  
22 between two creditors. Thus, "arising under" jurisdiction was not  
23 at issue. Further, the second adversary proceeding, unlike here,  
24 was not filed while the debtor's chapter 11 case was pending and  
25 did not have any direct impact on the debtor or the administration  
26 of debtor's estate. The Ninth Circuit indicated that had it been,  
27 the outcome would have been different. Id. at 548-49.

28 We further conclude that Battle Ground Plaza, LLC v. Ray

1 (In re Ray), 624 F.3d 1124 (9th Cir. 2010), which did address  
2 "arising under" jurisdiction, has not overruled In re McCowan.  
3 The Ninth Circuit reversed the BAP's ruling that the bankruptcy  
4 court had "arising under" jurisdiction over a breach of contract  
5 claim the BAP believed impacted the court's prior sale order. Id.  
6 at 1132-33. There, after the chapter 11 debtor's plan had been  
7 confirmed and the case closed, a lawsuit arose over the sale of  
8 real property that had been sold with the bankruptcy court's  
9 approval to a third party. A would-be purchaser brought suit in  
10 state court seeking damages for breach of contract against the  
11 debtor, the co-owner and the successful third-party purchaser.  
12 The state court thought it appropriate to "remand" the contract  
13 action to the bankruptcy court for it to determine whether it had  
14 jurisdiction over the matter. The bankruptcy court reopened the  
15 case, determined that it had jurisdiction over plaintiff's claims  
16 and granted summary judgment in favor of the debtor and co-owner  
17 dismissing the suit. Id. at 1129.

18       The Ninth Circuit overruled the BAP, holding that a state-law  
19 breach of contract action brought post-confirmation and  
20 post-closing arising out of the debtor's and co-owner's alleged  
21 failure to comply with the purchaser's right of first refusal was  
22 not a suit "arising under" the Bankruptcy Code for jurisdictional  
23 purposes. The court did not, however, hold that In re McCowan,  
24 which the BAP relied upon for its contrary holding, was no longer  
25 good law. In fact, the Ninth Circuit reaffirmed and distinguished  
26 In re McCowan, stating that "[t]he action in In re McCowan was for  
27 the direct enforcement of the bankruptcy court's order, a very  
28 different posture from the case before us." In re Ray, 624 F.3d

1 at 1132.

2 Arguably, the instant action could be characterized as an  
3 action for breach of contract. However, we conclude it is more  
4 like the action at issue in In re McCowan than in In re Ray; it  
5 was for the interpretation of, and, effectively, the direct  
6 enforcement of, the bankruptcy court's order regarding the  
7 dischargeability of a debt over which it had exclusive  
8 jurisdiction. Accordingly, the bankruptcy court had "arising  
9 under" jurisdiction.

10 Alternatively, the bankruptcy court had ancillary  
11 jurisdiction to interpret and enforce its prior Judgment and the  
12 related Settlement Agreement. "Ancillary jurisdiction may rest on  
13 one of two bases: (1) to permit disposition by a single court of  
14 factually interdependent claims, and (2) to enable a court to  
15 vindicate its authority and effectuate its decrees." In re Ray,  
16 624 F.3d at 1135 (quoting In re Valdez Fisheries, 439 F.3d at  
17 549) (citing Kokkonen, 511 U.S. at 379-80).

18 Goldman cites Kokkonen to support her argument that the  
19 bankruptcy court did not have ancillary jurisdiction over the  
20 Settlement Agreement because it failed to reserve jurisdiction  
21 over it. In Kokkonen, the Supreme Court held that a federal  
22 district court lacked jurisdiction to enforce a settlement  
23 agreement reached in conjunction with dismissal of a lawsuit under  
24 Civil Rule 41, where the district court neither reserved  
25 jurisdiction nor had independent jurisdiction to enforce the  
26 agreement. 511 U.S. at 375. The stipulation and dismissal order  
27 did not reserve jurisdiction over the settlement agreement or make  
28 any reference to the settlement agreement. The Supreme Court

1 noted:

2 The situation would be quite different if the parties'  
3 obligation to comply with the terms of the settlement  
4 agreement had been made part of the dismissal – either by  
5 separate provision (such as a provision "retaining  
6 jurisdiction" over the settlement agreement) or by  
7 incorporating the terms of the settlement agreement in  
8 the order. In that event, a breach of the agreement  
would be a violation of the order, and ancillary  
jurisdiction to enforce the agreement would therefore  
exist. That, however, was not the case here. The  
judge's mere awareness and approval of the terms of the  
settlement agreement do not suffice to make them part of  
his order.

9 Id. at 381. Thus, if the court's judgment incorporates the terms  
10 of a stipulated settlement or expressly retains jurisdiction over  
11 such a settlement, the court has ancillary jurisdiction to enforce  
12 the agreed judgment. Otherwise, enforcement of settlement  
13 agreements is for state courts. Id. at 382.

14 We distinguish Kokkonen on one critical fact. In that case,  
15 no "judgment" was ever entered by the district court. The parties  
16 agreed to settle their dispute and voluntarily dismissed the case  
17 pursuant to Civil Rule 41. Thus, the district court was never  
18 interpreting or enforcing its own order or judgment. Here, the  
19 bankruptcy court entered a judgment of nondischargeability of a  
20 debt against Debtor. As we have already stated, the bankruptcy  
21 court had jurisdiction to interpret and enforce its own judgment.  
22 In re McCowan, 296 B.R. at 4-5; In re Birting Fisheries, Inc.,  
23 300 B.R. at 499.

24 Further, as prescribed in Kokkonen and contrary to Goldman's  
25 contention, the bankruptcy court did reserve jurisdiction over the  
26 Settlement Agreement. The Judgment incorporated the Stipulation.  
27 The Stipulation incorporated the key terms of the Settlement  
28 Agreement. The Judgment also expressly incorporated the

1 Settlement Agreement:

2 IT IS FURTHER ORDERED that this Judgment shall not be  
3 enforceable so long as [Debtor] performs under the terms  
4 of the Settlement Agreement entered into between the  
Parties, but that in the event of a default, [Goldman]  
may enforce this Judgment.

5 Goldman incorrectly asserts that the Settlement Agreement does not  
6 contain a provision requiring or allowing the bankruptcy court to  
7 determine if Debtor was in default of the Settlement Agreement.  
8 Paragraph 3 expressly reserved jurisdiction to the bankruptcy  
9 court, stating that it "would retain jurisdiction over the terms  
10 of the [Settlement Agreement] and its enforcement."

11 Accordingly, the bankruptcy court had jurisdiction under  
12 28 U.S.C. §§ 1334(b) and 157(b) (2) (I). We now address our  
13 jurisdiction.

14 **B. The Order is not a final appealable order.**<sup>4</sup>

15 Our jurisdiction requires that the order to be reviewed be  
16 final. 28 U.S.C. § 158. We generally lack jurisdiction to hear  
17 appeals from interlocutory orders. See Giesbrecht v. Fitzgerald  
18 (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010).

19 A disposition is final "if it contains 'a complete act of  
20 adjudication,' that is, a full adjudication of the issues at bar,  
21 and clearly evidences the judge's intention that it be the court's  
22 final act in the matter." Slimick v. Silva (In re Slimick),  
23 928 F.2d 304, 307 (9th Cir. 1990) (citation omitted) (emphasis in  
24 original). In bankruptcy, a complete act of adjudication does not

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25  
26 <sup>4</sup> Debtor contends the Order is not a final order because the  
27 appeal is moot. We disagree. The jurisdictional concepts of  
28 finality and mootness are mutually exclusive. An interlocutory  
order does not equate to an appeal being moot, and a moot appeal  
does not necessarily mean that the order on appeal is not final.

1 need to end the entire case, but must "end any of the interim  
2 disputes from which appeal would lie." Id. at 307 n.1. The Order  
3 determined that Debtor did not breach the Settlement Agreement,  
4 and that a payment to Goldman of \$85,000 out of the escrow would  
5 satisfy the nondischargeability Judgment. It did not, however,  
6 adjudicate the remaining two issues of whether Goldman properly  
7 filed her Abstract or whether she should be held in contempt of  
8 court.

9       Because Debtor was found not to have breached the Settlement  
10 Agreement, one could argue that the bankruptcy court did  
11 implicitly decide Goldman's filing of the Abstract was improper  
12 and that she was not entitled to enforce the \$240,000 Judgment.  
13 An order can be considered final if the court's ruling as a  
14 practical matter effectively "rendered moot" all claims not  
15 explicitly disposed of. U.S. v. \$5,644,540.00 in U.S. Currency,  
16 799 F.2d 1357, 1361 (9th Cir. 1986). Even so, this still leaves  
17 the contempt issue, which does not appear to be "rendered moot" by  
18 anything decided in the Order. In any event, the bankruptcy court  
19 clearly anticipated further proceedings on these issues. If  
20 further proceedings in the bankruptcy court will affect the scope  
21 of the order, the order is not subject to review under 28 U.S.C.  
22 § 158. See Dunkley v. Rega Props., Ltd. (In re Rega Props.,  
23 Ltd.), 894 F.2d 1136, 1138 (9th Cir. 1990).

24       The record evidences that this was not the bankruptcy court's  
25 final act in the matter. Evidence of intent consists not only of  
26 the order's content, but also of the judge's and parties' conduct.  
27 In re Slimick, 928 F.2d at 308. Statements by the bankruptcy  
28 court at the January 24, 2014 hearing on Goldman's motion for stay

1 pending appeal indicate that further proceedings are contemplated  
2 with respect to the Motion that led to the Order on appeal.

3 Specifically, the bankruptcy court stated that it had not  
4 determined whether the Abstract should have been recorded or  
5 whether Goldman should be held in contempt, and that those matters  
6 would be decided at a later date. Hr'g Tr. (Jan. 24, 2014)  
7 18:2-10; 33:5-12; 34:8-12; 47:1-5; 52:2-7. The court also  
8 indicated that it had not decided the breach issue conclusively  
9 or, at minimum, that it was questioning its prior determination  
10 that Debtor had not breached the Settlement Agreement. Precisely,  
11 the court stated that the evidence so far was not dispositive and  
12 that discovery and more evidence were needed to decide the matter.  
13 Id. at 12:3-16; 18:10-19:5; 20:15-21:10; 29:8-30:4; 47:25-48:21;  
14 50:21-23; 52:13-16. At one point, Goldman offered to withdraw her  
15 appeal if the parties were going to be allowed to relitigate the  
16 issue. Id. at 49:5-16; 51:1-5. The court responded that  
17 modification of the Order might be appropriate, but the pendency  
18 of the appeal likely barred it from making such a modification.  
19 Id. at 51:6-10. Goldman again offered to withdraw her appeal if  
20 the court was willing to modify the Order. Id. at 51:11-17. The  
21 court declined and instead set dates for future status conferences  
22 on the original contempt claim and the new contempt claim. Id. at  
23 51:18-52:23. Based on the record, we conclude the Order is not a  
24 final appealable order.

25 We lack jurisdiction over interlocutory orders unless we  
26 grant leave to appeal. In re Giesbrecht, 429 B.R. at 687.  
27 Although Goldman has not filed a motion for leave to appeal, we  
28 may treat her timely notice of appeal as a motion for leave to

1 appeal. Rule 8003(c); Kashani v. Fulton (In re Kashani), 190 B.R.  
2 875, 882 (9th Cir. BAP 1995). Granting leave is appropriate if  
3 the order "involves a controlling question of law as to which  
4 there is substantial ground for difference of opinion" and where  
5 "an immediate appeal may materially advance the ultimate  
6 termination of the litigation." 28 U.S.C. § 1292(b);  
7 In re Kashani, 190 B.R. at 882. A substantial ground for  
8 difference of opinion exists "when novel legal issues are  
9 presented, on which fair-minded jurists might reach contradictory  
10 conclusions . . . ." Reese v. BP Exploration (Alaska) Inc.,  
11 643 F.3d 681, 688 (9th Cir. 2011).

12 The Order at issue does not meet any of the requirements for  
13 granting leave to appeal. Whether Debtor breached the Settlement  
14 Agreement is not a controlling question of law which presents a  
15 novel issue over which fair-minded jurists might reach  
16 contradictory conclusions. Further, deciding the appeal will not  
17 materially advance the ultimate termination of the litigation.  
18 The issues regarding the Abstract and Goldman's purported contempt  
19 still remain to be decided. Once they are, the parties could  
20 appeal any subsequent order, which will lead only to piecemeal  
21 litigation based on the same facts and conduct. Therefore, we  
22 decline to grant leave to appeal.

## 23 VI. CONCLUSION

24 Because the Order is not a final appealable order and we  
25 decline to grant leave to appeal, we lack jurisdiction over this  
26 appeal. Accordingly, we DISMISS.

27

28