

DEC 07 2015

NOT FOR PUBLICATION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

5	In re:	)	BAP No.	NC-14-1573-TaDJu
6	JACQUELINE C. MELCHER,	)	Bk. No.	01-53251
7	A/K/A Jacqueline Carlin,	)		
8	Debtor.	)		
9	JACQUELINE C. MELCHER,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	JOHN W. RICHARDSON, CHAPTER 7	)		
13	TRUSTEE,	)		
14	Appellee.	)		

Argued and Submitted on October 23, 2015  
at San Francisco, California

Filed - December 7, 2015

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Appearances: Jacqueline C. Melcher argued pro se; Charles  
Patrick Maher of McKenna Long & Aldridge LLP  
argued for John W. Richardson, Chapter 7 Trustee.

Before: TAYLOR, DUNN, and JURY, 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 8024-1(c)(2).

1 **INTRODUCTION**

2 In the latest installment of this ongoing bankruptcy saga,  
3 chapter 7<sup>1</sup> debtor Jacqueline Melcher appeals from the bankruptcy  
4 court's pre-filing order. We AFFIRM the bankruptcy court in the  
5 main; but, in a narrow regard, we REVERSE and REMAND with  
6 instructions that the bankruptcy court strike certain language  
7 from the order.

8 **FACTS<sup>2</sup>**

9 The Debtor is no stranger to the Panel; various issues in  
10 her now 14-year old bankruptcy case spawned two prior appeals.  
11 See Estate of Terrence P. Melcher v. Melcher (In re Melcher),  
12 2006 WL 6810966 (9th Cir. BAP May 31, 2006) ("Melcher I"),  
13 aff'd, 300 F. App'x 455 (9th Cir. 2008); Richardson v. Melcher  
14 (In re Melcher), 2014 WL 1410235 (9th Cir. BAP Apr. 11, 2104)  
15 ("Melcher II"). Those memorandum decisions detail the factual  
16 background of the property division disputes between the Debtor  
17 and her deceased ex-husband and his probate estate and the  
18 Debtor's bankruptcy. There is a long complicated history, but  
19 we recount here only those facts most relevant to the present  
20 appeal.

21 At the heart of the Debtor's disputes is 3.75 acres of real  
22 property located on Martha's Vineyard and known as "Stonewall."  
23

---

24 <sup>1</sup> Unless otherwise indicated, all chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

26 <sup>2</sup> We exercise our discretion to take judicial notice of  
27 documents filed in the bankruptcy case. See Atwood v. Chase  
28 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th  
Cir. BAP 2003).

1 During pre-petition divorce proceedings, a California state  
2 court ordered the Debtor to sell Stonewall and then split the  
3 proceeds with her ex-husband. In the face of this mandate, she  
4 filed a chapter 11 petition in June 2001, mere hours before a  
5 sale of Stonewall was to close.

6 In September 2008, the bankruptcy case was converted to  
7 chapter 7. As the Melcher II panel observed, the Debtor then  
8 began to "oppose[] most substantive actions of the Trustee to  
9 liquidate estate property." 2014 WL 1410235, at \*2.

10 Eventually, the Trustee requested, at least twice, an  
11 adjudication that the Debtor was a "vexatious litigant"; the  
12 bankruptcy court denied these requests.

13 Following a further series of protracted proceedings  
14 relating to his unsuccessful attempts to sell Stonewall, the  
15 Trustee made another attempt to obtain an order controlling the  
16 Debtor-driven litigation juggernaut. The Trustee asserted that  
17 the Debtor had:

18 [S]teadily depleted her bankruptcy estate by (1)  
19 incurring during the Chapter 11 case \$3.5 million in  
20 professional expenses, borrowing approximately the same  
21 sum secured by equity in real estate, and selling [a  
22 rental property], and (2) filing possibly 1,000  
23 pleadings or more during the Chapter 7 case, [and]  
24 challenging the Trustee in almost every aspect of his  
25 administration of the bankruptcy estate.

26 Id. at \*8. The bankruptcy court, again, denied his motion, and  
27 the Trustee appealed.

28 On appeal, the Melcher II panel determined that the  
Trustee's motion in effect requested a pre-filing restriction  
and that the bankruptcy court abused its discretion in denying  
this request. After determining that the standard articulated

1 in DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990), was  
2 applicable, it vacated and remanded. In short, DeLong required  
3 consideration of factors which were clearly satisfied based on  
4 the evidence in the record on appeal: the Debtor received  
5 sufficient notice and an opportunity to be heard in relation to  
6 the request for a pre-filing order, and an adequate record of  
7 the Debtor's abusive litigation activities over a lengthy period  
8 of time existed. The Melcher II panel observed that the  
9 Debtor's history of litigation and motive in pursuing litigation  
10 "were no longer subject to any dispute," and pointed to the  
11 Ninth Circuit's determination in another appeal that the  
12 Debtor's motive in the bankruptcy case was an abusive use of the  
13 bankruptcy process. Id. at \*10-11. It also noted that the  
14 "record establishe[d] beyond any question that estate assets  
15 [had] been all but used up as a result of [the Debtor's]  
16 continued meritless litigation." 2014 WL 1410235, at \*11. And,  
17 finally, it noted that no sanction short of a pre-filing  
18 restriction would curtail the Debtor's actions.

19 The Melcher II panel, thus, concluded that the bankruptcy  
20 court abused its discretion and clearly erred in denying the  
21 Trustee's motion. It vacated the order denying the motion and  
22 remanded the case back to the bankruptcy court with instructions  
23 that it make appropriate findings and that it implement an  
24 appropriate pre-filing order.

25 On remand, the bankruptcy court complied and issued the  
26 required order ("Pre-Filing Order"). Based on its findings, the  
27 bankruptcy court ordered that the Debtor was "enjoined from  
28 filing, in this bankruptcy case, and any related litigation with

1 the Trustee in any other federal or state court, any further  
2 pleadings without prior order of this Court.” It then provided  
3 guidelines for any proposed future filings. The Debtor  
4 appealed.

### 5 **JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
7 §§ 1334 and 157(b) (2) (A) and (O). We have jurisdiction under  
8 28 U.S.C. § 158.

### 9 **ISSUE**

10 Whether the bankruptcy court abused its discretion in  
11 issuing the Pre-Filing Order.

### 12 **STANDARD OF REVIEW**

13 We review for an abuse of discretion a bankruptcy court’s  
14 decision to issue pre-filing orders. See Ringgold-Lockhart v.  
15 Cnty. of Los Angeles, 761 F.3d 1057, 1062 (9th Cir. 2014). A  
16 bankruptcy court abuses its discretion if it applies the wrong  
17 legal standard, misapplies the correct legal standard, or if its  
18 factual findings are illogical, implausible, or without support  
19 in inferences that may be drawn from the facts in the record.  
20 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832  
21 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,  
22 1262 (9th Cir. 2009) (en banc)).

23 We may affirm on any basis supported by the record. Heers  
24 v. Parsons (In re Heers), 529 B.R. 734, 740 (9th Cir. BAP 2015).

### 25 **DISCUSSION**

#### 26 **A. Request for recusal**

27 As a preliminary matter, we consider the Debtor’s motion  
28 seeking an order recusing Judge Dunn from this appeal based on

1 his membership in the Melcher II panel.<sup>3</sup> She contends that the  
2 Melcher II panel, including Judge Dunn, was unduly harsh and  
3 simply “adopted the Trustee’s unsupported litigious accusations  
4 against [her] and did not rule on the prudential standing issue  
5 on appeal.” Given his involvement in Melcher II, the Debtor  
6 believes that “Judge Dunn cannot hear the [appeal] in a fair and  
7 prudential manner.”

8 The decision on a motion to recuse a judge rests with that  
9 particular judge. See Bernard v. Coyne (In re Bernard), 31 F.3d  
10 842, 843 (9th Cir. 1994). As a result, Judge Dunn is  
11 appropriately involved in the recusal decision.

12 In relevant part, 28 U.S.C. § 455(a)-(b)(1) provides that a  
13 judge must “disqualify himself in any proceeding in which his  
14 impartiality might **reasonably** be questioned,” such as “[w]here  
15 he has a personal bias or prejudice concerning a party . . . .”  
16 Emphasis added. Whether an appearance of impropriety exists is  
17 examined from an objective standpoint. Blixseth v. Yellowstone  
18 Mountain Club, LLC, 742 F.3d 1215, 1219 (9th Cir. 2014) (“We  
19 gauge appearance by considering how the conduct would be viewed  
20 by a reasonable person, not someone hypersensitive or unduly  
21 suspicious.”) (internal quotation marks and citation omitted).

22 Here, Judge Dunn’s involvement in Melcher II is an  
23 insufficient basis to demonstrate impartiality, personal bias,  
24 or prejudice. It is well established that “judicial rulings  
25 alone almost never constitute a valid basis for a bias or  
26

---

27 <sup>3</sup> Judge Jury was also a member of the Melcher II panel;  
28 however the Debtor does not seek her recusal from this appeal.

1 partiality motion.” Liteky v. United States, 510 U.S. 540, 555  
2 (1994). That Judge Dunn sat on the Melcher II panel and gained  
3 information and insight in so doing is also an insufficient  
4 basis. “[O]pinions formed by the judge on the basis of facts  
5 introduced or events occurring in the course of the current  
6 proceedings, or of prior proceedings, do not constitute a basis  
7 for a bias or partiality motion unless they display a  
8 deep-seated favoritism or antagonism that would make fair  
9 judgment impossible.” Id.

10 Here, the Debtor fails to show that the Melcher II decision  
11 or any other facts reveal a “high degree of favoritism or  
12 antagonism” by Judge Dunn such that a fair judgment on this  
13 appeal is impossible. She takes particular umbrage at the  
14 following statement in the Melcher II decision: “she [the  
15 Debtor] will only sell the Stonewall property if she absolutely  
16 has to at the end of her life.” The decision, however, refers  
17 to this statement only twice,<sup>4</sup> and in doing so is quoting the  
18 bankruptcy court’s statement at a prior hearing. Judge Dunn’s  
19 impartiality is not subject to reasonable question; we deny the  
20 Debtor’s motion to recuse.

21 **B. Pre-filing Order**

22 On appeal, the Debtor reiterates the long litigation history  
23 involving Stonewall and then argues that the Trustee had no  
24 basis to declare her a vexatious litigant or to assassinate her  
25 character and reputation. She asserts that the Trustee’s

---

26  
27 <sup>4</sup> The Melcher I decision also refers to this statement,  
28 also quoting the bankruptcy court. Judge Dunn, however, did not  
sit on the Melcher I panel.

1 efforts are at their core an attempt to retroactively void a  
2 prior bankruptcy court order that permitted her to object to the  
3 Trustee's fees. To be clear, the sole issue before us on this  
4 appeal is whether the bankruptcy court abused its discretion in  
5 issuing the Pre-filing Order; the prudential standing issue that  
6 is the focus of much of the Debtor's argument on appeal is not  
7 before us. With one narrow exception, we conclude that there  
8 was no abuse of discretion.

9 A pre-filing restriction permits a federal court to  
10 "regulate the activities of [an] abusive litigant[] by imposing  
11 carefully tailored restrictions under . . . appropriate  
12 circumstances." Ringgold-Lockhart, 761 F.3d at 1061. This  
13 restriction, however, must be tempered by a litigant's right of  
14 access to the courts. Id.

15 In this respect, in order to impose pre-filing restrictions,  
16 a federal court must: (1) give the litigant notice and "an  
17 opportunity to oppose the order" prior to its entry; (2) compile  
18 an adequate record for appellate review, including "a listing of  
19 all the cases and motions that led the [] court to conclude that  
20 a vexatious litigant order was needed"; (3) make substantive  
21 findings of frivolousness or harassment; and (4) tailor the  
22 order narrowly so as "to closely fit the specific vice  
23 encountered." Id. at 1062. The first two requirements are  
24 procedural in nature; the third and fourth, constitute  
25 "substantive considerations." Id.

26 The Melcher II panel concluded that the procedural  
27 considerations were satisfied. It instructed the bankruptcy  
28 court on remand to make appropriate findings in connection with

1 the substantive considerations. As a result, our review in this  
2 appeal is focused solely on those particular requirements.

3 In assessing the substantive considerations and determining  
4 “whether a party is a vexatious litigant and whether a  
5 pre-filing order will stop the vexatious litigation or if other  
6 sanctions are adequate,” the court must consider the following  
7 five factors, known as the “Safir<sup>5</sup> factors”:

- 8 (1) the litigant’s history of litigation and in particular  
9 whether it entailed vexatious, harassing or duplicative  
10 lawsuits;
- 11 (2) the litigant’s motive in pursuing the litigation, e.g.,  
12 does the litigant have an objective good faith expectation  
13 of prevailing?;
- 14 (3) whether the litigant is represented by counsel;
- 15 (4) whether the litigant has caused needless expense to other  
16 parties or has posed an unnecessary burden on the courts  
17 and their personnel; and
- 18 (5) whether other sanctions would be adequate to protect the  
19 courts and other parties.

20 Ringgold-Lockhart, 761 F.3d at 1062. The fifth factor is of  
21 particular importance. Id.

22 **1. Findings of Frivolousness or Harassment**

23 To determine whether litigation is frivolous, the court  
24 “must look at both the number and content of the filings as  
25 indicia of the frivolousness of the litigant’s claims.” Id. at  
26

---

27 <sup>5</sup> See Safir v. U.S. Lines, Inc., 792 F.2d 19 (2d Cir.  
28 1986).

1 1064 (internal quotation marks and citation omitted). The court  
2 may also "make an alternative finding that the litigant's  
3 filings show a pattern of harassment." Id. (internal quotation  
4 marks and citation omitted). Repetitious filings do not  
5 constitute harassment per se; rather, the court must determine  
6 whether the repetitious filings are done with "an intent to  
7 harass the defendant or the court." Id.

8 Here, the bankruptcy court identified the Safir factors and  
9 made the following findings thereunder:

10 First factor.

- 11 • Many of the Debtor's multiple pleadings and appeals were  
12 duplicative of matters already ruled upon and/or were  
13 frivolous and, in many instances, intended to block the  
14 normal bankruptcy process and inhibit the Trustee from  
15 administering the estate;
- 16 • The Debtor continued to re-hash arguments that the  
17 bankruptcy court had already ruled on; and
- 18 • The Debtor directed personal attacks against the Trustee and  
19 his counsel, and other parties in the case, including her  
20 ex-husband's estate and its counsel.

21 Second factor. The Debtor's numerous, largely duplicative  
22 filings were an abuse of the bankruptcy process.

23 Third factor. While the Debtor was unrepresented, her pro  
24 se status was not enough to overcome the fact that she  
25 continually failed to heed the bankruptcy court's efforts to  
26 instruct her as to proper procedures and to limit her arguments.

27 Fourth factor.

- 28 • The Debtor's conduct had caused needless expense and

1 unnecessary burden to other parties and to the bankruptcy  
2 court; and

- 3 • Many of the estate's assets had been expended as a result of  
4 the Debtor's continued and substantially meritless  
5 litigation, negatively impacting creditors and the Trustee.

6 Fifth factor. No sanction short of a pre-filing restriction  
7 would curtail the Debtor's duplicative or frivolous filings. As  
8 stated, the Debtor had not heeded the bankruptcy court's  
9 admonitions and surcharging a claimed homestead exemption was no  
10 longer viable in light of Law v. Siegel.

11 On this record, the bankruptcy court's findings were not  
12 clearly erroneous. As detailed in Melcher I and Melcher II, and  
13 the Ninth Circuit's unpublished decision affirming Melcher I in  
14 Melcher v. Estate of Terrence P. Melcher (In re Melcher), 300 F.  
15 App'x 455 (9th Cir. 2008), the Debtor has a long history of  
16 filing motions, papers, and appeals that are frivolous or  
17 evidence a pattern of harassment. The Debtor continues to  
18 advance arguments about Stonewall and the impropriety of the  
19 Trustee's and other parties' actions in relation to the  
20 property. See, e.g., In re Melcher, 300 F. App'x at 456 ("[T]he  
21 [BAP] has found that Jacqueline did not file the [Chapter 11]  
22 Plan in good faith but to keep Stonewall from being sold. It is  
23 time to bring this abuse of the bankruptcy process to an end.  
24 We affirm the judgment of the BAP."). The order to sell  
25 Stonewall was long ago adjudicated by the California state  
26 court, affirmed by the California court of appeal, and is now  
27 beyond dispute in the federal courts. See In re Marriage of  
28 Melcher, 2006 WL 119127, at \*18 (Cal. Ct. App. Jan. 13, 2006)

1 (affirming the state court's order to sell Stonewall), reh'g  
2 denied, Feb. 9, 2006, review denied, Mar. 29, 2006.

3 There is no question that a once solvent estate is now  
4 insolvent due to the Debtor's protracted efforts to stall the  
5 sale of Stonewall and other real properties. Between the dates  
6 that the case was converted to chapter 7 (and the Trustee was  
7 appointed to the case) and the Debtor's filing of the notice of  
8 appeal in the present appeal, there have been over 2,000 docket  
9 entries in the bankruptcy case. Review of the docket in just  
10 the first year of the chapter 7 case reflects a number of  
11 motions, oppositions, and other papers filed by the Debtor - the  
12 bankruptcy court denied many of the Debtor's requests and  
13 objections contained therein. This pattern continued in  
14 subsequent years.

15 On this record, the bankruptcy court's findings clearly  
16 support a vexatious litigant finding and the imposition of a  
17 pre-filing restriction against her.

## 18 **2. Narrowly tailored**

19 In addition, a "pre-filing order[] must be narrowly tailored  
20 to the vexatious litigant's wrongful behavior."  
21 Ringgold-Lockhart, 761 F.3d at 1066 (internal quotation marks  
22 and citation omitted). In Ringgold-Lockhart, the Ninth Circuit  
23 determined that the pre-filing order was too broad where the  
24 order provided that the district court would first deem the  
25 action "meritorious." The Ninth Circuit determined that by  
26 adding this qualifier, "the district court added a screening  
27 criteria that is not narrowly tailored to the problem before it,  
28 and is in fact unworkable." Id.

1 Here, the Pre-Filing Order provides that the bankruptcy  
2 court "will permit the filing of the pleading only if it appears  
3 that the pleading has merit and is not duplicative of matters  
4 previously ruled upon by this Court and/or an appellate court,  
5 and has not been filed for the purposes of harassment or delay."  
6 With one exception, we conclude that the order is not overly  
7 broad.

8 First, the screening criteria are substantively narrowly  
9 tailored. The order refers to criteria as: "not duplicative of  
10 matters previously ruled upon by" the bankruptcy court or an  
11 appellate court, and which has not been filed for the purposes  
12 of harassment or delay; these are appropriate screening  
13 criteria. The order, however, contains one form of  
14 inappropriate criterion: that the bankruptcy court will  
15 determine whether the pleading "appears to have merit." As  
16 stated in Ringgold-Lockhart, this type of criterion is overly  
17 broad for a pre-filing restriction. See 761 F.3d at 1066.  
18 Nonetheless, the offensive language may be stricken from the  
19 order without issue.

20 Second, the Pre-Filing Order is appropriately limited to  
21 actions involving the Trustee. Again, the record clearly shows  
22 that the Debtor has fought the Trustee at every step both in and  
23 out of the bankruptcy court, thereby exhausting significant  
24 estate assets and prejudicing the interests of creditors and the  
25 Debtor alike. There is no danger that this portion of the order  
26 could extend to factual scenarios entirely unrelated to the  
27 Trustee in his capacity as the estate representative.

**CONCLUSION**

Based on the foregoing, we AFFIRM the bankruptcy court in part; but, we REVERSE and REMAND the order back to the bankruptcy court with instructions that it strike the "has merit and" phrase from page four, line 19 of the Pre-Filing Order.