

DEC 09 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. EC-15-1286-LFKi  
 ) BAP No. EC-15-1292-LFKi  
 6 YOUSIF H. HALLOUM, ) BAP No. EC-15-1297-LFKi  
 ) (related appeals)  
 7 Debtor. )  
 ) Bk. No. 12-21477-C-7  
 8 )  
 9 YOUSIF H. HALLOUM; IMAN Y. ) Adv. No. 15-02091-C  
 HALLOUM, )  
 )  
 10 Appellants, )  
 v. )  
 11 ) **MEMORANDUM\***  
 12 KATZEN & SCHURICHT; DAVID I. )  
 KATZEN; HILTON A. RYDER; )  
 13 McCORMICK, BARSTOW LLP; )  
 SCOTT KOENIG; MICHAEL G. )  
 14 KASOLAS; MICHAEL C. ABEL; )  
 SCOTT H. MCNUTT; MCNUTT LAW )  
 15 GROUP, LLP, )  
 )  
 16 Appellees. )

Submitted Without Oral Argument  
on November 17, 2016

Filed - December 9, 2016

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Appearances: Yousif H. Halloum and Iman Y. Halloum on brief pro  
 se; Scott H. McNutt, Michael C. Abel and Thomas B.  
 Rupp of McNutt Law Group LLP on brief for  
 appellees Michael G. Kasolas, Chapter 7 Trustee,  
 McNutt Law Group LLP, Scott H. McNutt and Michael  
 C. Abel; David I. Katzen of Katzen & Schuricht and

\* 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.

1 Alan Scott Koenig of ASK Law Offices on brief for  
2 appellees Scott Koenig, David I. Katzen, and  
3 Katzen & Schuricht; Scott M. Reddie of McCormick  
Barstow LLP on brief for appellees McCormick  
Barstow LLP and Hilton A. Ryder.

4  
5 Before: LAFFERTY, KIRSCHER, and FARIS, Bankruptcy Judges.

6 **INTRODUCTION**

7 After Debtor Yousif Halloum's chapter 11<sup>1</sup> case was converted  
8 to chapter 7 and his discharge entered, Debtor and his non-debtor  
9 spouse, Iman Halloum ("Iman") (collectively, "Halloums"), filed a  
10 lawsuit in state court against Debtor's former bankruptcy counsel  
11 and his law firm ("Ryder Defendants"), the chapter 7 trustee and  
12 his counsel ("Trustee Defendants"), and counsel for Debtor's  
13 primary secured creditor ("Bank Group"), asserting claims for  
14 malpractice and breach of contract against the Ryder Defendants  
15 and civil conspiracy and intentional interference with  
16 prospective economic advantage against all defendants. All of  
17 the claims were predicated on defendants' conduct during the  
18 course of the bankruptcy proceeding.

19 After the chapter 7 trustee removed the lawsuit to the  
20 bankruptcy court, Halloums filed a motion to remand, which was  
21 denied. The Trustee Defendants and Bank Group filed motions for  
22 summary judgment. Halloums opposed the summary judgment motions,  
23 requested a continuance to complete discovery, and filed a second  
24 motion to remand ("Remand Motion"). The bankruptcy court set an

25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 evidentiary hearing at which Halloums presented their case in  
2 chief. The bankruptcy court denied the Remand Motion and  
3 dismissed the claims against all of the defendants on the merits,  
4 finding that the evidence was insufficient to establish Halloums'  
5 claims. Halloums timely appealed.<sup>2</sup> We AFFIRM.

6 **FACTS**

7 **A. Prepetition Events**

8 Debtor operated an ARCO gas station and convenience store on  
9 real property located in Lodi, California. Beginning in 2005,  
10 Community Banks of Colorado ("Community Banks"), the  
11 predecessor-in-interest to Bank Midwest, N.A. ("Bank Midwest"),  
12 made loans to Debtor that were secured by Debtor's commercial  
13 real and personal property. Debtor also had his business demand  
14 deposit (checking) account ("DDA") with Bank Midwest. The  
15 commercial loan agreement contained a cross-default provision  
16 which provided that a default in the terms of the DDA agreement  
17 constituted a default under the note and deed of trust.

18 In late 2010 and thereafter, Debtor overdrew the DDA. On  
19 March 20, 2011, Debtor met with representatives of Community  
20 Banks. Debtor contended that a bank representative orally agreed  
21 at that meeting that Debtor would be allowed to make an \$88,000  
22 overdraft and promised that Community Banks would convert the  
23 overdraft to an unsecured loan.

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24  
25 <sup>2</sup> The orders at issue in these consolidated appeals are:  
26 (1) the bankruptcy court's denial of plaintiffs' motion for  
27 remand or abstention and a stay of proceedings (EC-15-1286);  
28 (2) the order granting in part the Bank Group's motion for  
summary judgment (EC-15-1297); and (3) the order granting the  
chapter 7 trustee's motion for summary judgment, which also  
dismissed all claims against all defendants (EC-15-1292).

1 Community Banks came under audit by the Federal Deposit  
2 Insurance Corporation ("FDIC"). Debtor became aware of this when  
3 he received an email dated July 29, 2011, from a representative  
4 of Community Banks stating that Debtor's loan file had been  
5 selected for audit by the FDIC and requesting a copy of Debtor's  
6 2010 tax extension form. Eventually, on October 21, 2011, the  
7 FDIC was appointed receiver for Community Banks, and Community  
8 Banks' accounts were transferred to Bank Midwest.

9 Around this time, Debtor defaulted under the loans by  
10 missing a loan payment, failing to pay property taxes, and  
11 overdrawing the DDA. Debtor received a letter dated October 11,  
12 2011, from Community Banks' counsel indicating that in the bank's  
13 view, there had been an unsatisfactory banking history and noting  
14 that the DDA overdraft had increased from \$88,000 as of March 18,  
15 2011 to \$190,000 as of October 11, 2011. The letter stated, in  
16 relevant part:

17 4. Please be advised that effective 10 days from  
18 the date of this letter, the Bank will no longer allow  
19 the DDA to be overdrawn, or honor any presentations for  
20 payment in excess of the collected balance of cleared  
21 funds in the account at the time of presentation. In  
22 addition, this is to inform you that if the cumulative  
23 total of pending overdrafts exceeds \$300,000 at any  
24 point between now and October 21, 2011, provisionally  
25 presented items causing such excess will be dishonored  
26 and returned unpaid.

27 Debtor interpreted this paragraph as authorization for a  
28 \$300,000 loan, and during the next ten days he took advantage of  
what he contended was Bank Midwest's accommodation to boost the  
overdrafts from approximately \$190,000 to \$297,372.49.

The October 11 letter also noted that Debtor was in material  
default under the commercial loan agreement for failure to make

1 the September 2011 installment payment, for failure to pay real  
2 property taxes, and by virtue of the cross-default provision.

3 On October 12, 2011, Community Banks filed a notice of  
4 default commencing foreclosure proceedings. Debtor contended  
5 that he tendered the September 2011 payment on October 13, 2011,  
6 and that the bank accepted the payment but returned it two days  
7 later, advising that the bank had already filed a notice of  
8 default. Debtor also contended that he had cured the default in  
9 the property taxes by way of a promissory note.

10 On January 20, 2012, a notice of trustee's sale under the  
11 trust deed was recorded. Bank Midwest also sued Halloums in  
12 San Joaquin County Superior Court to recover on the \$297,372.49  
13 overdraft. Halloums cross-complained, alleging breach of a  
14 contract to transform the overdraft into some unspecified term  
15 loan. The bank's demurrer to the cross-complaint and the  
16 trustee's sale were stayed by the filing of Debtor's bankruptcy  
17 petition.

## 18 **B. Chapter 11 Bankruptcy Events**

19 Debtor filed a chapter 11 petition on January 26, 2012, in  
20 the U.S. Bankruptcy Court for the Eastern District of California.  
21 On April 23, 2012, Bank Midwest filed an adversary proceeding  
22 against Debtor seeking a judgment of nondischargeability as to  
23 the \$297,372.49 overdraft, alleging fraud in Debtor's failure to  
24 disclose to Community Banks that he needed the loan to cover the  
25 overdrafts because he had lost approximately \$500,000 speculating  
26 on the stock market.

27 Debtor was initially represented in the bankruptcy by  
28 Appellee Hilton A. Ryder, a seasoned attorney with substantial

1 experience representing debtors in possession in bankruptcy  
2 reorganization cases. Ryder worked with Debtor's creditors,  
3 including Bank Midwest, to formulate a consensual chapter 11  
4 plan. Ryder filed an initial plan and disclosure statement on  
5 May 23, 2013; the bankruptcy court approved Debtor's disclosure  
6 statement on November 6, 2013. Thereafter, Debtor filed a second  
7 amended disclosure statement and plan that was set for  
8 confirmation on January 29, 2014. However, by this time Debtor's  
9 relationship with Bank Midwest had broken down to the point where  
10 the bank was not willing to endure any continuing relationship  
11 with Debtor. Also, Debtor was insisting on special default  
12 provisions in the plan to which Bank Midwest objected. The  
13 bankruptcy court concluded that the parties were at an impasse  
14 and decided to appoint a chapter 11 trustee to evaluate whether  
15 the case could reasonably move toward confirmation. Appellee  
16 Michael Kasolas ("Trustee") was appointed chapter 11 trustee.

17 Trustee initially believed that a consensual resolution was  
18 possible and asked the court to allow more time to confirm a  
19 plan. On January 17, 2014, Trustee emailed Ryder and indicated  
20 that Trustee would support a plan that, among other things,  
21 required Debtor to deposit \$200,000 to cover accrued  
22 administrative fees, and that Debtor must waive any objection to  
23 Ryder's fees. Around this time, however, Debtor decided that  
24 Ryder's services were too expensive and took the position that  
25 Ryder had agreed to do all the work in the chapter 11 case for a  
26 flat fee of \$40,000, including the filing fee. Debtor took this  
27 position despite having approved Ryder's five interim fee  
28 applications totaling well in excess of \$40,000, and paying those

1 fees.<sup>3</sup> In early February 2014, Debtor fired Ryder and hired  
2 attorney Daniel Weiss to represent him in the bankruptcy.

3 In light of these developments, Trustee concluded that it  
4 was hopeless to expect a confirmable plan of reorganization  
5 because Debtor could not be trusted to carry it out; thus he  
6 recommended to the bankruptcy court that the case be converted to  
7 chapter 7. On February 12, 2014, the bankruptcy court converted  
8 the case, and Trustee was appointed chapter 7 trustee. The  
9 bankruptcy court acknowledged the possibility that the case could  
10 be reconverted to chapter 11 should the parties reach an  
11 agreement in short order. The next day, Debtor moved to  
12 reconvert the case to chapter 11 and instructed his new counsel  
13 to file an amended plan and disclosure statement that would  
14 include Bank Midwest's proposed default terms. At a hearing on  
15 February 26, 2014, the bankruptcy court heard argument from all  
16 parties (including Midwest Bank, which argued that reconversion  
17 was futile because it could not trust Debtor) and denied the  
18 motion to reconvert because Debtor had not established any  
19 grounds for such relief.

### 20 **C. Post-Conversion Bankruptcy Events**

21 Trustee took possession of Debtor's business. He also  
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23 <sup>3</sup> After the case was converted, Ryder filed a fee  
24 application requesting total fees of \$144,280.38, which the  
25 bankruptcy court approved over Debtor's objection. Debtor  
26 appealed that order (BAP No. EC-14-1219-JuKuPa). We vacated the  
27 order and remanded for additional findings. The bankruptcy court  
28 made findings on August 25, 2015 and, on August 26, 2015, entered  
an Order on Remand reinstating the order approving Ryder's fees.  
Debtor appealed that order (BAP No. EC-15-1291-DTaJu), and we  
affirmed. Debtor appealed to the Ninth Circuit Court of Appeals  
(9th Cir. Case No. 16-60059). That matter is still pending.

1 negotiated a settlement with Bank Midwest that allowed the  
2 business to be sold, with Bank Midwest discounting its claim and  
3 agreeing to subordinate up to \$150,000 of its claim to satisfy  
4 allowed administrative expenses. The bankruptcy court approved  
5 Trustee's settlement with Bank Midwest over Debtor's objection.

6 Trustee eventually sold the business,<sup>4</sup> but not before Iman  
7 intervened and asserted her right as the non-debtor spouse to  
8 purchase the business under § 363(i). The bankruptcy court  
9 afforded her the opportunity to purchase the business despite  
10 questions about her right to do so.<sup>5</sup>

11 Ultimately, Iman was unable to complete her purchase of the  
12 business and filed a motion seeking the return of her deposit,  
13 which was granted. In the pleadings that sought the return of  
14 her security deposit, Iman alleged that Trustee interfered with  
15 her ability to obtain a fuel franchise agreement and that this  
16 prevented her from purchasing the business. At other times,  
17 including in the underlying adversary complaint, Iman or Debtor  
18 alleged that Trustee interfered with Iman's financing source and  
19 convinced the lender not to loan her money to purchase the  
20 business.

21 On February 13, 2015, Halloums filed a complaint in the  
22

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23 <sup>4</sup> Debtor appealed the bankruptcy court's order approving the  
24 sale to this court. The Panel dismissed the appeal as moot  
25 because the sale of the business had been completed. Debtor  
26 appealed the dismissal ruling to the Ninth Circuit. That appeal  
27 is still pending (9th Cir. Case No. 14-60086).

28 <sup>5</sup> Debtor's schedules listed the business and its assets as  
his separate property, and the real property records showed that  
the land upon which the business was located was Debtor's sole  
and separate property per an interspousal transfer deed.



1 Superior Court of California, County of San Francisco. The  
2 complaint sought redress for the loss of their business as the  
3 result of the pending bankruptcy case and named as defendants  
4 Trustee, individually and as chapter 7 trustee; Ryder; McCormick,  
5 Barstow, Sheppard, Wayte & Carruth ("McCormick Barstow"); David  
6 I. Katzen; Katzen & Schuricht; Scott H. McNutt; Michael C. Abel;  
7 McNutt Law Group; and Alan Scott Koenig. McCormick Barstow is  
8 Ryder's law firm. Defendant Katzen, a partner in defendant law  
9 firm Katzen & Schuricht, and defendant Koenig are attorneys who  
10 represented Bank Midwest. Defendants McNutt and Abel, partners  
11 in defendant law firm McNutt Law Group, are counsel who  
12 represented Trustee in the bankruptcy case.

13 The complaint alleged five causes of action: (1) legal  
14 malpractice against Ryder; (2) breach of contract against Ryder;  
15 (3) civil conspiracy against Ryder, McCormick Barstow, Katzen,  
16 and Katzen & Schuricht; (4) civil conspiracy against all  
17 defendants; and (5) intentional interference with prospective  
18 economic advantage against all defendants.

19 Trustee filed a timely notice of removal in the U.S.  
20 Bankruptcy Court for the Northern District of California.  
21 Halloums moved to remand the matter back to state court; the  
22 bankruptcy court denied the motion.<sup>6</sup> On May 6, 2015, the

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24 <sup>6</sup> Halloums appealed the denial of the first remand motion to  
25 the U.S. District Court for the Northern District of California,  
26 which dismissed the appeal on grounds that the order was  
27 interlocutory. Halloums then appealed to the Ninth Circuit Court  
28 of Appeals, which dismissed the appeal for lack of jurisdiction.  
As discussed below, Halloums subsequently filed a second remand  
motion that was denied by the bankruptcy court; the order denying  
(continued...)

1 adversary proceeding was transferred to the U.S. Bankruptcy Court  
2 for the Eastern District of California.

3       The Bank Group moved for summary judgment on June 2, 2015,  
4 seeking dismissal of the claims against them on grounds that  
5 (1) those claims were released by virtue of the court-approved  
6 settlement between Trustee and Bank Midwest; (2) any claim that  
7 anyone in the Bank Group interfered with Iman's prospective  
8 economic advantage as a purchaser of property from Debtor's  
9 bankruptcy estate was precluded by the order granting her motion  
10 to compel Trustee's repayment of a security deposit; and  
11 (3) nothing alleged in the complaint stated a claim against  
12 anyone in the Bank Group upon which relief could be granted in  
13 favor of Halloums, Trustee, or Debtor's estate.

14       Shortly thereafter, on June 11, 2015, the Trustee Defendants  
15 filed a motion for summary judgment seeking dismissal on similar  
16 grounds: (1) the preclusive effect of the order granting Iman's  
17 motion to compel Trustee's repayment of a security deposit; and  
18 (2) failure to state a claim.

19       Halloums filed an opposition to the Trustee Defendants'  
20 summary judgment motion asserting, among other things, that there  
21 were disputed issues of material fact.

22       The bankruptcy court held a status conference on July 9,  
23 2015. The bankruptcy court noted that it had the discretion to  
24 hold an evidentiary hearing on the motions for summary judgment  
25 to determine whether there were any genuine issues of material

26 \_\_\_\_\_  
27       <sup>6</sup>(...continued)  
28 the motion is one of the orders at issue in these consolidated  
appeals.

1 fact to be litigated and proposed to do so.<sup>7</sup> Debtor agreed to  
2 this proposal and indicated at this hearing that he would testify  
3 at the evidentiary hearing. In addition, Debtor stated that he  
4 intended to present testimony of the agent who handled Iman's  
5 loan to purchase the business and a forensic document examiner to  
6 testify as to the signature on the retainer agreement between  
7 Debtor and Ryder.

8 Debtor requested additional discovery in the form of a  
9 subpoena to the FDIC examiner who had examined Community Banks.  
10 The bankruptcy court responded that it would not authorize  
11 further discovery until after the evidentiary hearing, if at all.  
12 Debtor agreed. The bankruptcy court summarized its intent as  
13 follows:

14 If I am not persuaded at the end of the day on  
15 August 12 that there's a genuine issue of material  
16 fact, I will terminate the litigation. If I find there  
17 is a genuine issue of material fact, then I will focus  
the further litigation on the genuine issues of  
material fact that I see. And that will considerably

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18 <sup>7</sup> Civil Rule 52(c), applicable in bankruptcy via Rule 7052,  
19 provides:

20 If a party has been fully heard on an issue during a  
21 nonjury trial and the court finds against the party on  
22 that issue, the court may enter judgment against the  
23 party on a claim or defense that, under the controlling  
24 law, can be maintained or defeated only with a  
25 favorable finding on that issue. The court may,  
however, decline to render any judgment until the close  
of the evidence. A judgment on partial findings must  
be supported by findings of fact and conclusions of law  
as required by Rule 52(a).

26 See also Granite State Ins. Co. v. Smart Modular Techs., Inc.,  
27 76 F.3d 1023, 1031 (9th Cir. 1996) ("[Civil Rule 52] authorizes  
28 the court to enter judgment at any time that it can appropriately  
make a dispositive finding of fact on the evidence.").

1 narrow any further work that would have to be done.

2 On July 29, 2015, Halloums filed the Remand Motion, which  
3 included a request to stay the proceedings. The Bank Group  
4 opposed the Remand Motion. The bankruptcy court entered an order  
5 shortening time for the Remand Motion to be heard on August 12,  
6 2015. At that hearing, the bankruptcy court orally denied the  
7 Remand Motion on grounds that the bankruptcy court had exclusive  
8 jurisdiction over the causes of action pleaded in the complaint,  
9 which were all based on allegations of wrongdoing during the  
10 bankruptcy case. The court memorialized the ruling in a civil  
11 minute order entered August 20, 2015, and Halloums timely  
12 appealed.

13 As promised at the July 9 status conference, the bankruptcy  
14 court then conducted an evidentiary hearing to allow Halloums to  
15 present all their evidence in support of their claims and to  
16 identify aspects of their case that required discovery. Debtor  
17 testified at length and was cross-examined; he offered no other  
18 witnesses. At the conclusion of Halloums' evidentiary  
19 presentation, the bankruptcy court rendered judgment on partial  
20 findings pursuant to Civil Rule 52(c).

21 On August 25, 2015, the bankruptcy court placed its findings  
22 of fact and conclusions of law orally on the record.<sup>8</sup> The  
23 bankruptcy court supplemented its findings of fact and  
24 conclusions of law in a memorandum decision, Halloum v. Ryder, et

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25  
26 <sup>8</sup> At the evidentiary hearing, Ryder testified regarding his  
27 fee agreement with Debtor. The August 25, 2015 oral ruling  
28 includes the bankruptcy court's findings regarding the fee  
agreement. As noted, the order approving Ryder's fees after  
remand is the subject of a separate appeal.

1 al. (In re Halloum), 2015 WL 5095340 (Bankr. E.D. Cal. Aug. 27,  
2 2015). There, the bankruptcy court determined that there was no  
3 basis for liability against any of the defendants and that the  
4 claims against Trustee must be dismissed because Halloums had not  
5 sought leave from the bankruptcy court before suing Trustee in  
6 the San Francisco Superior Court.<sup>9</sup> On August 27, 2015, the  
7 bankruptcy court entered orders granting the motions for summary  
8 judgment in part and dismissing the claims against all defendants  
9 on the merits.<sup>10</sup>

10 Halloums filed timely notices of appeal from the bankruptcy  
11 court's orders granting in part the motions for summary judgment  
12 and dismissing the claims against all defendants on the merits.

13 On November 7, 2016, Halloums filed with the Panel a motion  
14 to suspend hearing and to transfer venue on grounds of bias.

#### 15 **JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

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18 <sup>9</sup> Halloums subsequently filed a motion for leave to sue the  
19 Trustee, which the bankruptcy court denied, rejecting Halloums'  
20 arguments that they were not required to obtain leave because  
21 there was no ongoing bankruptcy proceeding and because their  
22 claims against Trustee were not connected to the performance of  
his duties as trustee. The Panel affirmed the bankruptcy court's  
ruling on October 27, 2016 (BAP No. EC-15-1401-JuKuMa); Halloums  
filed a motion for rehearing on November 7, 2016.

23 <sup>10</sup> On August 29, 2015, the Bank Group filed a motion/  
24 application to augment determinations and amend judgment,  
25 requesting that the bankruptcy court make findings that (1) the  
26 estate's claims against the Bank Group were released as a matter  
27 of law by way of the settlement between Trustee and Bank Midwest;  
28 and (2) the adversary complaint failed to state a claim against  
the Bank Group. The bankruptcy court denied that motion by order  
entered October 16, 2015, with the exception of clarifying that  
its findings and rulings with respect to the Trustee Defendants  
applied to the merits of the case against them.

1 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.  
2 § 158.

3 **ISSUES**

4 1. Should the Panel grant Halloums' motion to suspend  
5 hearing and transfer venue?

6 2. Did the bankruptcy court err in denying the Remand  
7 Motion?

8 3. Did the bankruptcy court abuse its discretion in  
9 denying Halloums' request for additional discovery?

10 4. Did the bankruptcy court err in dismissing Halloums'  
11 claims against Trustee based on the Barton doctrine?

12 5. Did the bankruptcy court err in entering judgment for  
13 defendants?

14 **STANDARDS OF REVIEW**

15 Preemption is a question of law which we review de novo.  
16 See MSR Expl., Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 912 (9th  
17 Cir. 1996).

18 We review a bankruptcy court's evidentiary rulings for abuse  
19 of discretion and reverse only if any error would have been  
20 prejudicial to the appellant. Van Zandt v. Mbunda  
21 (In re Mbunda), 484 B.R. 344, 351-52 (9th Cir. BAP 2012), aff'd,  
22 604 F. App'x 552 (9th Cir. 2015).

23 We review the bankruptcy court's findings of fact for clear  
24 error and its conclusions of law de novo. Carrillo v. Su  
25 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). A finding is  
26 clearly erroneous "when although there is evidence to support it,  
27 the reviewing court on the entire evidence is left with the  
28 definite and firm conviction that a mistake has been committed."

1 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)  
2 (citation omitted). Where two permissible views of the evidence  
3 exist, the factfinder's choice between them cannot be clearly  
4 erroneous. Id. at 574. We are to give "due regard to the trial  
5 court's opportunity to judge the witnesses' credibility." Civil  
6 Rule 52(a)(6). We also give deference to inferences drawn by the  
7 trial court. Beech Aircraft Corp. v. United States, 51 F.3d 834,  
8 838 (9th Cir. 1995).

## 9 DISCUSSION

### 10 **A. Preliminary Matter: Halloums' Motion to Suspend Hearing and** 11 **Transfer Venue**

12 As noted, on November 7, 2016, Halloums filed a motion to  
13 suspend hearing and transfer venue. Appellees McCormick Barstow  
14 and Ryder opposed the motion. For the reasons explained below,  
15 we deny all relief requested in the November 7 motion and decline  
16 Appellees' request for an order to show cause regarding  
17 sanctions.

#### 18 **1. Request to Suspend Hearing Denied; No Hearing Scheduled**

19 Pursuant to a motion panel's order of October 5, 2015, these  
20 appeals were submitted for disposition without oral argument on  
21 November 17, 2016. Thus, the request to suspend hearing of these  
22 appeals will be denied on the ground that oral argument was never  
23 scheduled.

#### 24 **2. Request to Transfer Appeals Denied**

25 Halloums request transfer of these appeals to the  
26 U.S. District Court. Specifically, they request transfer of the  
27 appeals not to the U.S. District Court for the Eastern District  
28 of California, but to another district court such as the

1 U.S. District Court for the Northern District of California.

2 Under 28 U.S.C. § 158, an appellant may elect that the  
3 appeal be heard by the U.S. District Court by doing so at the  
4 time of the filing of the notice of appeal. 28 U.S.C.  
5 § 158(c)(1)(A); see also Amended Order Continuing the BAP at  
6 ¶ 3(a) (time for election). Halloums did not elect to the have  
7 the district court hear these appeals at the time of filing the  
8 notices of appeal. While the Panel may transfer an appeal to the  
9 district court to further the interests of justice under 9th Cir.  
10 BAP R. 8005-1, transfer of these appeals to the U.S. District  
11 Court would not further the interests of justice. Furthermore,  
12 there is no statutory basis for the Panel to transfer to a  
13 different district court other than the U.S. District Court for  
14 the Eastern District of California. 28 U.S.C. § 158(a).

15 **3. Appellants have not demonstrated a denial of due**  
16 **process.**

17 Halloums submit that they have been denied due process of  
18 law. We disagree. Due process requires sufficient notice of a  
19 pending proceeding and the opportunity for interested parties to  
20 be heard. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306,  
21 314 (1950). If deficient process is shown, Appellants must also  
22 show resulting prejudice. Rosson v. Fitzgerald (In re Rosson),  
23 545 F.3d 764, 776 (9th Cir. 2008). Considering the prior appeals  
24 decided by the Panel and the statements made by Halloums  
25 regarding the conduct of Appellee Ryder, there is no indication  
26 that Halloums failed to receive sufficient notice and opportunity  
27 to be heard.



1           **4. Request for Recusal Denied**

2           Halloums submit that since their trial court judge was a  
3 prior member of the Bankruptcy Appellate Panel, the Panel is  
4 unable to render an unbiased decision with respect to their  
5 appeals. Having carefully considered the motion, we disagree  
6 with appellants and deny their request for recusal of the Panel.

7           Recusal under 28 U.S.C. § 455(a) is appropriate where "a  
8 reasonable person with knowledge of all the facts would conclude  
9 that the judge's impartiality might reasonably be questioned."  
10 Blixseth v. Yellowstone Mountain Club, LLC, 742 F.3d 1215, 1219  
11 (9th Cir. 2014) (citation omitted).

12           Recusal is not appropriate in these appeals. The prior  
13 adverse rulings of the Panel are not sufficient cause for  
14 recusal. Berger v. United States, 255 U.S. 22, 31 (1921); United  
15 States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986).

16 Furthermore, there are no other competent factual bases  
17 indicating bias or influence on the Panel by Judge Klein or any  
18 rational, objective basis for concern about such issues. Judge  
19 Klein's term on the Panel ended in 2008, several years before the  
20 filing of the underlying bankruptcy case and adversary  
21 proceeding, and after his term expired Judge Klein did not  
22 participate as a pro tem BAP panel member in the disposition of  
23 any appeal filed by Appellants. See Amended Order Continuing the  
24 BAP at ¶ 5 ("[A] bankruptcy judge shall not participate in an  
25 appeal originating in a district for which the judge is appointed  
26 or designated under 28 U.S.C. § 152."). Nor is there evidence of  
27 any bias on the part of this Panel.

1 **B. The bankruptcy court did not err in denying the Remand**  
2 **Motion.**

3 The bankruptcy court denied the Remand Motion because it  
4 concluded (in our view, correctly) that the causes of action  
5 pleaded in the complaint all pertained to conduct by the  
6 defendants that occurred during the bankruptcy case. As such,  
7 the bankruptcy court concluded that the adversary proceeding was  
8 squarely within the exclusive jurisdiction of the bankruptcy  
9 court and that the Bankruptcy Code provided applicable remedies  
10 that preempted the state law causes of action detailed in  
11 Halloums' complaint.<sup>11</sup> We find no error in this conclusion.

12 Ordinarily, a cause of action arises under federal law only  
13 when the complaint raises issues of federal law. Miles v. Okun  
14 (In re Miles), 430 F.3d 1083, 1088 (9th Cir. 2005) (citing Metro.  
15 Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987)). However, the  
16 preemptive force of some federal statutes is so strong that they  
17 completely preempt an area of state law. Id. It is settled law  
18 in this Circuit that a complaint seeking damages for a party's  
19 conduct during a bankruptcy case is within exclusive federal  
20 jurisdiction, and any allegedly competing state court action is  
21 preempted by the Bankruptcy Code. See MSR Expl., Ltd., 74 F.3d  
22 at 912-16 (holding that debtor's malicious prosecution claim

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24 <sup>11</sup> The remedies delineated by the bankruptcy court were:  
25 (1) fee disgorgement for attorneys pursuant to §§ 328(c) and  
26 329(b), (2) claim disallowance pursuant to § 502, (3) surcharge  
27 of the Trustee's bond pursuant to § 322, (4) protections for  
28 debtors during the plan confirmation process pursuant to  
§ 1126(c)-(e), (5) protections against collusive sales pursuant  
to § 363(n), and (6) the bankruptcy court's inherent power to  
prevent an abuse of process pursuant to § 105(a).

1 against creditor based on creditor's actions in the bankruptcy  
2 was preempted by the Bankruptcy Code); see also In re Miles,  
3 430 F.3d at 1086 (affirming removal and dismissal of state law  
4 tort action for damages resulting from the filing of involuntary  
5 bankruptcy petitions because § 303(i) preempts state law tort  
6 causes of action for damages predicated upon the filing of an  
7 involuntary bankruptcy petition); Gonzales v. Parks, 830 F.2d  
8 1033, 1035-36 (9th Cir. 1987) (holding that state court was  
9 without jurisdiction to hear a claim that the filing of a  
10 bankruptcy petition constituted an abuse of process).

11 Halloums' only argument on appeal regarding this issue is  
12 that the bankruptcy court should have exercised its discretion to  
13 "abstain" from deciding the claims asserted in the adversary  
14 proceeding. However, based on the foregoing authorities, the  
15 bankruptcy court did not have discretion to remand.<sup>12</sup> The  
16 bankruptcy court correctly ruled that it had exclusive  
17 jurisdiction over the causes of action in Halloums' complaint and  
18 did not err in denying the Remand Motion.<sup>13</sup>

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19  
20 <sup>12</sup> The Remand Motion alternatively requested abstention  
21 pursuant to 28 U.S.C. § 1334. However, abstention is  
22 inapplicable to removed proceedings because "a successful removal  
23 effectively extinguishes the parallel proceeding in state court."  
24 Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 820  
(9th Cir. BAP 2009) (citing Sec. Farms v. Int'l Bhd. of  
Teamsters, 124 F.3d 999, 1010 (9th Cir. 1997)).

25 <sup>13</sup> On appeal, Halloums seem to argue that the bankruptcy  
26 court erred in ruling that they were not entitled to trial by  
27 jury. However, Halloums do not specifically address the right to  
28 a jury trial. The bankruptcy court found that Debtor had invoked  
bankruptcy court jurisdiction by filing his chapter 11 case, and  
Iman had invoked bankruptcy court jurisdiction when she moved to  
(continued...)

1 **C. The bankruptcy court did not abuse its discretion in denying**  
2 **Halloums' request to conduct additional discovery.**

3 At the July 9, 2015 status conference, Debtor indicated that  
4 he believed Community Banks' officers had falsely told the FDIC  
5 examiner that the bank had not authorized an overdraft and that  
6 as a result the examiner ordered the bank to "terminate" the  
7 loan, which is what led to the loss of Debtor's business. Debtor  
8 requested issuance of a subpoena to the FDIC for the notes of the  
9 bank examination that led to FDIC's seizure and takeover of  
10 Community Banks in an effort to show the bank's motivation to  
11 improperly commence a foreclosure. At the evidentiary hearing,  
12 Debtor requested additional time to obtain that discovery. In  
13 its oral ruling, the bankruptcy court noted that obtaining such  
14 discovery would likely be a lengthy and expensive process because  
15 the FDIC would probably resist the disclosure of its internal  
16 notes. The court also noted that the passage of time would raise  
17 questions of causation. Ultimately, the bankruptcy court denied  
18 the request because it found that such information would be  
19 beyond the scope of discovery as not being reasonably calculated  
20 to lead to the discovery of admissible evidence. Moreover, even  
21 if relevant, the court found that such evidence would be  
22 cumulative because there was ample evidence in the record of Bank  
23 Midwest's distrust and reluctance to have any further dealing  
24 with Halloums. In re Halloum, 2015 WL 5095340, at \*2.

25 \_\_\_\_\_  
26 <sup>13</sup> (...continued)  
27 enforce her rights under § 363. We discern no error in this  
28 finding. See Langenkamp v. Culp, 498 U.S. 42, 44 (1990); Hickman  
v. Hana (In re Hickman), 384 B.R. 832, 836-40 (9th Cir. BAP  
2008).

1 We find no error in the bankruptcy court's ruling. The  
2 bankruptcy court may enter a judgment on partial findings even  
3 though a party has represented that it can adduce further  
4 evidence if the court determines that the evidence will have  
5 little or no probative value. EBC, Inc. v. Clark Bldg. Sys.,  
6 Inc., 618 F.3d 253, 272 n.21 (3d Cir. 2010).

7 On appeal, Halloums argue that the subpoena request to the  
8 FDIC examiner would result in "key evidence" to prove unlawful  
9 foreclosure, but they do not present any argument or point to any  
10 evidence in the record to refute the bankruptcy court's  
11 conclusion that any evidence obtained would have no probative  
12 value. Halloums also argue that there were other discovery  
13 requests pending, citing to various documents filed in the  
14 adversary proceeding, including Halloums' opposition to Trustee's  
15 motion for summary judgment, declaration in support of that  
16 opposition, Statement of Disputed Facts, Memorandum in Support of  
17 Plaintiffs' Motion to Begin Discovery, and request for  
18 evidentiary hearing with limited discovery. Although those  
19 documents, in particular the Statement of Disputed Facts, do  
20 request additional discovery (including nonprivileged  
21 communications between defendants), Debtor did not bring any of  
22 those requests to the bankruptcy court's attention at the  
23 evidentiary hearing. Moreover, Debtor does not explain how  
24 additional discovery would be likely to uncover evidence with any  
25 probative value in light of the bankruptcy court's ultimate  
26 findings.

1 **D. The bankruptcy court's dismissal of the claims against**  
2 **Trustee based on the Barton doctrine was harmless error.**

3 The bankruptcy court dismissed the claims against Trustee in  
4 part because Halloums had not obtained permission to sue the  
5 Trustee. The bankruptcy court also ordered that any effort by  
6 Halloums to obtain legal relief in any court other than the  
7 bankruptcy court would constitute contempt. As noted by the  
8 bankruptcy court, "[i]t is settled law that a trustee may be sued  
9 only with leave of the court that appointed the trustee."  
10 In re Halloum, 2015 WL 5095340, at \*3 (citing Barton v. Barbour,  
11 104 U.S. 126, 128 (1881); and Beck v. Fort James Corp.  
12 (In re Crown Vantage, Inc.), 421 F.3d 963, 970-71 (9th Cir.  
13 2005)). "[A] party must first obtain leave of the bankruptcy  
14 court before it initiates an action in another forum against a  
15 bankruptcy trustee or other officer appointed by the bankruptcy  
16 court for acts done in the officer's official capacity."  
17 In re Crown Vantage, Inc., 421 F.3d at 970 (citations omitted).

18 It is undisputed that Halloums did not obtain the bankruptcy  
19 court's consent to sue Trustee in state court and thereby  
20 violated the Barton doctrine. However, the Ninth Circuit Court  
21 of Appeals has held that when a case is **removed** to the appointing  
22 bankruptcy court, "all problems under the Barton doctrine  
23 vanish[]." Harris v. Wittman (In re Harris), 590 F.3d 730, 742  
24 (9th Cir. 2009). The Barton doctrine denies subject matter  
25 jurisdiction to all forums **except** the appointing court; it is "a  
26 practical tool to ensure that all lawsuits that could affect the  
27 administration of the bankruptcy estate proceed either in the  
28 bankruptcy court, or with the knowledge and approval of the

1 bankruptcy court.” Id.<sup>14</sup>

2 In light of In re Harris, dismissal on grounds of the Barton  
3 doctrine was error, but such error was harmless because, as  
4 discussed below, the bankruptcy court fully considered and  
5 properly dismissed the claims against Trustee on the merits after  
6 taking evidence on those claims.

7 Because we conclude that the Barton doctrine did not operate  
8 to deprive the bankruptcy court of jurisdiction to hear and  
9 determine the claims asserted, we need not address Halloums’  
10 arguments that the Barton doctrine is not a substantive bar to  
11 their action because the bankruptcy estate had been fully  
12 administered;<sup>15</sup> that Trustee was not being sued in his official  
13 capacity; and that the bankruptcy court erred in not examining  
14 the factors set forth in In re Crown Vantage, Inc., 421 F.3d at  
15 976 (citing Kashani v. Fulton (In re Kashani), 190 B.R. 875, 886-  
16 87 (9th Cir. BAP 1995)).

17 Halloums also contend that the bankruptcy court erred in  
18 ordering that their filing of a lawsuit against Trustee in  
19 another forum would constitute contempt. Their sole argument on  
20 this point is that Iman is not a debtor, and Debtor has obtained  
21 a discharge, thus there is no automatic stay. This argument does  
22 not overcome the requirement that permission is required before  
23 suing a bankruptcy trustee in a forum other than the bankruptcy  
24

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25 <sup>14</sup> No party cited In re Harris to the bankruptcy court.

26 <sup>15</sup> Ninth Circuit authority is to the contrary. See  
27 In re Crown Vantage, Inc., 421 F.3d at 972 (the Barton doctrine  
28 serves additional purposes even after the bankruptcy case has  
been closed and the assets are no longer in the trustee’s hands).

1 court.

2 **E. The bankruptcy court did not err in dismissing the adversary**  
3 **proceeding on the merits and entering judgment in favor of**  
4 **all defendants.**

5 The adversary complaint alleged claims for legal malpractice  
6 and breach of contract against Ryder for allegedly mishandling  
7 the chapter 11 case and charging more than was allowed by the fee  
8 agreement. The complaint also alleged two counts of civil  
9 conspiracy. The first was against the Ryder Defendants and the  
10 Bank Group for allegedly cooperating in a scheme to convert the  
11 bankruptcy case to chapter 7, delay the sale of the business,  
12 interfere with Iman's purchase of the business, and financially  
13 harm Debtor. The second conspiracy claim was against all  
14 defendants for conspiring to persuade Trustee to "abandon his  
15 neutral role and begin advocating positions and court actions  
16 that would benefit the Bank and all co-conspirators." Halloums  
17 also alleged that the conspiracy included maximizing the legal  
18 billings of Trustee's counsel while minimizing the work done for  
19 the estate and enabling all participants to financially exploit  
20 the estate for profit and harm Debtor by minimizing the funds  
21 available to pay creditors. Finally, the complaint alleged a  
22 claim for intentional interference with prospective economic  
23 advantage against all defendants. This claim alleged that Iman  
24 had secured most of the financing necessary to purchase the  
25 business and had a willing lender, but that someone acting on  
26 behalf of Trustee called the lender and "apparently" discouraged  
27 the lender from extending the loan.

28 At the evidentiary hearing, Debtor testified for several  
hours and presented documentary evidence in support of his



1 claims. As authorized under Civil Rule 52(c),<sup>16</sup> the bankruptcy  
2 court considered the testimony, evidence, and arguments presented  
3 by the parties and concluded that Halloums had failed to prove  
4 the elements of any cause of action against any of the  
5 defendants, as summarized below.<sup>17</sup>

6 **1. Breach of Contract - Ryder Defendants**

7 The bankruptcy court found that, contrary to Debtor's  
8 assertion that Ryder had agreed to handle the chapter 11 case for  
9 a fixed fee, the fee agreement between Ryder and Debtor was on a  
10 retainer basis calling for hourly compensation. This finding was  
11 based on the original retainer agreement, which was admitted into  
12 evidence.<sup>18</sup> Additionally, the bankruptcy court's order  
13 authorizing Ryder's employment called for hourly "lodestar"  
14 compensation and not a fixed fee. Debtor presented no plausible  
15 evidence to the contrary. Thus, we find no error in the  
16 bankruptcy court's findings.

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19 <sup>16</sup> Although no party has raised the issue, the bankruptcy  
20 court was clearly within its discretion to hold an evidentiary  
21 hearing to discern any material factual disputes rather than  
22 adjudicating the motions for summary judgment as presented.

23 <sup>17</sup> The bankruptcy court disposed of the malpractice claim  
24 against the Ryder Defendants in a separate order allowing Ryder's  
25 fees as an administrative claim against the estate. As noted,  
26 that order is the subject of a separate appeal. Nevertheless,  
some of the issues overlap due to the conspiracy allegations;  
therefore, we include in our analysis the bankruptcy court's  
findings vis-à-vis the Ryder Defendants.

27 <sup>18</sup> The bankruptcy court rejected Debtor's contention that  
28 the signature on the retainer agreement was not Debtor's. That  
issue is not before us in these appeals.

1           **2. Breach of Contract - Bank Midwest**

2           Although this claim was not separately pleaded in the  
3 complaint and Bank Midwest was not named as a defendant, Debtor  
4 presented evidence and argument on this issue, which he sometimes  
5 referred to as an "unlawful foreclosure," although no trustee's  
6 sale occurred. Debtor testified that he was only three weeks  
7 behind on his mortgage payments when Community Banks commenced  
8 foreclosure proceedings. He testified that Community Banks  
9 representatives had orally promised him they would convert the  
10 overdraft to an unsecured loan but instead commenced foreclosure  
11 because of the FDIC audit. The bankruptcy court found that there  
12 was no evidence that Bank Midwest breached its contract with  
13 Debtor by commencing foreclosure when Debtor was only three weeks  
14 behind on his mortgage. There was no written agreement with  
15 Community Banks to convert the overdraft into a term loan. To  
16 the contrary, the evidence showed that Community Banks considered  
17 the overdraft to be a breach of the DDA agreement and that the  
18 overdraft constituted a default under the mortgage documents.  
19 The bankruptcy court did not err in dismissing this claim.

20           On appeal, Halloums present new arguments regarding their  
21 claim against Bank Midwest. First, they allege that the amounts  
22 shown in the notice of default and notice of sale were different  
23 so the foreclosure was brought improperly and in violation of  
24 state law.<sup>19</sup> Halloums also argue they are entitled to pursue a

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25  
26           <sup>19</sup> The notice of default shows a default amount of  
27 \$14,521.94 and states that all sums secured by the deed of trust  
28 are due and payable. The notice of sale shows a total of  
\$2,626,845.72 due and payable, which includes the overdraft and  
(continued...)

1 claim against Bank Midwest under the Consumer Legal Remedies Act  
2 (Cal. Civ. Code § 1750 et seq.). Because these allegations and  
3 arguments were not made to the bankruptcy court, we will not  
4 consider them. See United Student Aid Funds, Inc. v. Wylie  
5 (In re Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006).

6 **3. Civil Conspiracy - Ryder Defendants and Bank Group**

7 The bankruptcy court found no evidence that the Ryder  
8 Defendants and the Bank Group were engaged in a conspiracy to  
9 prolong the case, inflate fees, or damage Debtor. Rather, the  
10 bankruptcy court concluded that the problems in reaching  
11 agreement were caused by distrust between the parties. As  
12 evidence of conspiracy, Debtor pointed to (a) Ryder's agreement  
13 with Bank Midwest to keep the adversary proceeding open as a  
14 "stick" to encourage plan performance; (b) Ryder's refusal to  
15 seek to equitably subordinate Bank Midwest's claim; (c) the  
16 separate classification of Bank Midwest's unsecured claim;  
17 (d) Ryder's failure to pursue approval of Debtor's proposed plan  
18 default provisions; (e) the inclusion in the plan of Bank  
19 Midwest's postpetition legal fees as an unsecured claim;  
20 (f) Ryder's delay in filing the initial chapter 11 plan; and  
21 (g) Ryder's refusal to pursue a cramdown of Bank Midwest's claim.

22  
23  
24  
25 

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<sup>19</sup>(...continued)

26 contractual fees. Putting aside the obvious differences in  
27 notice requirements and cure obligations in notices of default  
28 and notices of sale, there was no foreclosure. Thus, any claims  
based on alleged irregularities in the foreclosure process are  
moot.

1                   **a.    Ryder's Agreement to Keep Nondischargeability**  
2                   **Proceeding Open**

3           Debtor testified that Ryder tried to persuade Debtor to  
4 stipulate to a nondischargeable judgment in the bankruptcy court,  
5 while Debtor wanted Ryder to move to dismiss the complaint.  
6 Instead, Ryder sent a letter to Bank Midwest suggesting that the  
7 adversary proceeding remain open for the duration of the plan as  
8 a "stick" to encourage plan performance. Debtor believed Bank  
9 Midwest allowed Ryder to use its cash collateral for unauthorized  
10 legal fees and that Ryder's suggestion to leave the adversary  
11 proceeding open was the quid pro quo for that concession.

12           The bankruptcy court found, after reading the  
13 nondischargeability complaint, that it stated a cause of action  
14 that would likely lead to a trial and that Debtor did not have  
15 adequate resources to fund extensive litigation with Bank  
16 Midwest. Additionally, because the nondischargeability complaint  
17 was personal to Debtor, Ryder would have been limited in the  
18 amount of estate funds he could expend to defend the suit. Thus,  
19 the bankruptcy court found that Ryder's suggestion to keep the  
20 adversary proceeding open, but inactive, was a "perfectly  
21 rational" solution that could pave the way to a consensual plan,  
22 and not evidence of a conspiracy between Ryder and the Bank  
23 Group.

24           Additionally, the bankruptcy court found that the record did  
25 not support a finding that cash collateral was used for  
26 unauthorized legal fees. Although the initial cash collateral  
27 budget did not include a provision for attorney's fees, this was  
28 because the approximately \$39,000 retainer would have been

1 sufficient to provide for payment of all fees through the end of  
2 that cash collateral budget. The bankruptcy court's findings are  
3 supported by the evidence and were not clearly erroneous.

4 **b. Ryder's Refusal to Move for Equitable**  
5 **Subordination**

6 Debtor testified that he believed Ryder should have moved  
7 for equitable subordination of Bank Midwest's claim or filed a  
8 fraudulent transfer action against Bank Midwest. Debtor believed  
9 Bank Midwest's secured claim was inflated because it included the  
10 value of car wash equipment that had been financed by U.S. Bank.  
11 Early in the case Ryder discovered that U.S. Bank failed to  
12 properly perfect its security interest in the car wash equipment  
13 and convinced U.S. Bank not to litigate the issue. As a result  
14 of the improper perfection and the after-acquired property clause  
15 in Bank Midwest's security agreement with Debtor, Bank Midwest's  
16 blanket lien extended to the car wash equipment, thus increasing  
17 its secured claim. The bankruptcy court found that because  
18 litigating equitable subordination would have been extremely  
19 difficult and expensive, and there was no evidence of misconduct  
20 by Bank Midwest, Ryder made a reasonable decision not to pursue  
21 it, especially in light of Ryder's obligation to focus on work  
22 that appeared likely to benefit the estate. The bankruptcy court  
23 also noted that raising the equitable subordination issue would  
24 have made it more difficult to achieve the consensual plan of  
25 reorganization that would be essential to helping Debtor save his  
26 business. Thus, the bankruptcy court found that Ryder's actions  
27 were in Debtor's best interest. We see no error in this finding.

1                   **c.     Separate Classification of Bank Midwest's**  
2                   **Unsecured Claim**

3           Debtor testified that Ryder insisted on separately  
4 classifying the bank's unsecured claim. Debtor believed that  
5 this classification resulted in a higher priority claim and  
6 entitled Bank Midwest to a greater payment than the other general  
7 unsecured creditors. Debtor surmises that Ryder and the Bank  
8 Group conspired to do this because they were aware the case would  
9 be converted and, upon conversion, Bank Midwest would receive a  
10 greater distribution than it would otherwise be entitled to.

11           The bankruptcy court found no collusion or improper benefit  
12 to Bank Midwest in the separate classification of its unsecured  
13 claim. The payment terms for Bank Midwest's claim and the  
14 remaining general unsecured creditors were identical. The only  
15 difference was that the plan provided for mutual releases between  
16 Debtor and Bank Midwest as of the effective date of the plan,  
17 which meant that Bank Midwest would release its  
18 nondischargeability claim, a benefit to Debtor. Further, the  
19 classification of claims in a chapter 11 plan is not controlling  
20 after the case is converted to chapter 7. The bankruptcy court's  
21 finding was not clearly erroneous.

22                   **d.     Ryder's Failure to Pursue Bank Midwest's**  
23                   **Acceptance of Default Plan Provisions**

24           Debtor asserted that Ryder did not sufficiently pursue Bank  
25 Midwest's acceptance of Debtor's proposed default provisions.  
26 Bank Midwest filed a conditional non-opposition to Debtor's  
27 disclosure statement, which Debtor interpreted to mean that the  
28 bank did not object to any plan provisions.

1 The bankruptcy court found no merit to Debtor's assertion  
2 that Ryder should have insisted Bank Midwest accept Debtor's  
3 proposed default terms, which was premised on the notion that  
4 Bank Midwest's conditional non-opposition to the disclosure  
5 statement bound it to the plan terms. The conditional non-  
6 opposition included the following language:

7 Bank Midwest's nonopposition to the Disclosure does **not**  
8 mean that Bank Midwest supports the Plan in its present  
9 form. Through counsel, Bank Midwest has informed  
10 Debtor of concerns it has about aspects of the Plan as  
11 formulated, and Bank Midwest reserves the right to vote  
12 against the Plan and to oppose confirmation if its  
13 concerns are not satisfactorily resolved.

14 (Emphasis in original). This language makes clear that the bank  
15 did not intend to accept the proposed plan terms. The bankruptcy  
16 court correctly found that Debtor's position was based on a  
17 misunderstanding of the difference between disclosure and  
18 confirmation issues and was not supported by the evidence.

19 **e. Inclusion of Bank Midwest's Postpetition Legal**  
20 **Fees as an Unsecured Claim**

21 Debtor testified that Ryder permitted inclusion of Bank  
22 Midwest's postpetition legal fees in the general unsecured class  
23 when the bank was not entitled to those fees, and that doing so  
24 gave the bank control of the voting, again evidencing a  
25 conspiracy between the bank and Ryder.

26 The bankruptcy court correctly noted that Ryder had no  
27 choice in whether to include those fees in Bank Midwest's claim  
28 because under Travelers Casualty & Surety Co. of America v.  
Pacific Gas & Electric Co., 549 U.S. 443 (2007), a creditor is  
entitled to add contractually based postpetition attorney's fees  
to its proof of claim. Thus, the inclusion of those fees does

1 not support a conspiracy finding.

2 **f. Delay in Filing Plan**

3 Debtor testified that he believed Ryder failed to file a  
4 proposed plan until 16 months after the filing of the petition to  
5 increase his fees and to delay the case for Bank Midwest's  
6 benefit.

7 The bankruptcy court correctly found that Ryder's delay in  
8 filing a plan of reorganization did not support any claims. The  
9 court noted that in Debtor's case, time was needed to determine  
10 expected revenue to support plan payments, that Debtor was  
11 pursuing litigation against ARCO, and that Ryder was negotiating  
12 with creditors to get agreements to plan treatment. The court  
13 noted that it had monitored the case during this time but did not  
14 order Ryder to file a plan because it was aware of these ongoing  
15 issues.

16 **g. Ryder's Refusal to Pursue Cramdown**

17 Debtor testified that he believed Ryder should have pursued  
18 a cramdown of Bank Midwest's claim because there were impaired  
19 classes that would have voted to accept the plan, and that  
20 Ryder's failure to do so evidenced his conspiracy with the Bank  
21 Group to convert the case to chapter 7. The bankruptcy court  
22 found no merit to this contention, noting that it is extremely  
23 expensive to litigate confirmation of a plan of reorganization,  
24 especially if it involves a cramdown, and that Bank Midwest was a  
25 "hostile creditor with the incentive to fight." Accordingly, the  
26 bankruptcy court found that Ryder pursued the appropriate  
27 strategy by negotiating a consensual plan with Bank Midwest,  
28 which would ultimately benefit Debtor by avoiding the costs



1 associated with a contested confirmation hearing. This finding  
2 was not clearly erroneous.

3 **4. Civil Conspiracy - All Defendants**

4 The bankruptcy court found that there was no evidence of any  
5 agreement, either express or implied, by any or all defendants to  
6 loot the estate and destroy the business after Trustee was  
7 appointed. Rather, "[t]he tragedy of this case is - and it is a  
8 genuine tragedy because it did not have to happen - that the  
9 requisite cooperation was not forthcoming. Instead, Mr. Halloum  
10 fixated on his theory that defendant Ryder had breached a  
11 fictional fixed fee agreement and conspired with the adversary."  
12 In re Halloum, 2015 WL 5095340 at \*6. The evidence supports the  
13 bankruptcy court's finding.

14 Debtor alleged that (a) Bank Midwest's counsel made  
15 misrepresentations to the bankruptcy court to get the settlement  
16 approved; (b) Trustee and the Bank Group conspired to "steal"  
17 funds from unsecured creditors; (c) Trustee failed to maximize  
18 the return to unsecured creditors; (d) Trustee conspired with  
19 Bank Midwest to set up default terms to end the chapter 11;  
20 (e) Trustee shut down the business in violation of his duties;  
21 and (f) Trustee changed position on conversion based on a  
22 conspiracy with the Bank Group.

23 **a. Alleged False Representation to Bankruptcy Court**  
24 **Re: Settlement Between Trustee and Bank Midwest**

25 Debtor testified that in seeking approval of the settlement  
26 between Bank Midwest and Trustee, Trustee's counsel falsely  
27 represented that Bank Midwest's claim would be reduced by  
28

1 \$1 million.<sup>20</sup> Debtor calculated that Bank Midwest actually  
2 increased its claim by \$500,000. Debtor based this calculation  
3 on his valuation of Bank Midwest's collateral (and thus its  
4 secured claim), which did not include the car wash equipment that  
5 Debtor valued at \$450,000. The bankruptcy court found Debtor's  
6 valuation implausible. This finding was not clearly erroneous.

7 Besides Debtor's opinion, the only evidence of value  
8 presented was one page from a June 28, 2013 business appraisal,  
9 which valued the furniture, fixtures, and equipment at \$110,500  
10 as of January 26, 2012, and a copy of an email dated  
11 September 27, 2013, from Debtor to an attorney stating that the  
12 liquidation value of the car wash was \$230,000. Accordingly, the  
13 bankruptcy court's finding that there was no misrepresentation by  
14 Trustee's counsel was not clearly erroneous.

15 **b. Trustee and Bank Group's Conspiracy to "Steal"**  
16 **Funds from Unsecured Creditors**

17 Debtor contended that Bank Midwest had agreed to reduce its  
18 claim to \$1.6 million and to subordinate up to \$100,000 of its  
19 interest in the proceeds of the sale of the business to ensure  
20 Trustee and his professionals were paid. According to Debtor,  
21 Bank Midwest actually received \$2.2 million and Trustee received  
22 \$275,000. Debtor alleged that Trustee overlooked the  
23 "overpayment" to Bank Midwest as part of a conspiracy to convert  
24

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25 <sup>20</sup> The settlement agreement provided that Bank Midwest would  
26 have an allowed secured claim of \$2,898,764 and an allowed  
27 unsecured claim of \$297,372 but that if Bank Midwest received  
28 payment by August 31, 2014, it would discount the secured claim  
to \$1,700,000 plus one-third of net sale proceeds in excess of  
\$1.7 million.

1 the case and get Bank Midwest and Trustee Defendants paid at the  
2 expense of creditors.

3 As evidence of these agreements, Debtor points to the  
4 declaration of David Katzen in support of Bank Midwest's motion  
5 to convert and Bank Midwest's reply in support of its motion to  
6 convert. The Katzen declaration describes the terms of a  
7 previous proposal calling for the reduction of the bank's claim  
8 to \$1.6 million, and the reply indicates that if the case were  
9 promptly converted, Bank Midwest would be willing to subordinate  
10 up to \$100,000 for payment of a trustee's sale-related  
11 administrative expenses.

12 Both of these documents merely describe **proposed** settlement  
13 terms. As noted, the settlement agreement that was ultimately  
14 approved by the bankruptcy court provided that Bank Midwest would  
15 reduce its secured claim to \$1.7 million plus one-third of net  
16 proceeds in excess of \$1.7 million and that Bank Midwest would  
17 subordinate up to \$150,000 to satisfy allowed administrative  
18 expenses. Debtor provided no evidence of the amounts actually  
19 received by Bank Midwest or Trustee.

20 The bankruptcy court found that this evidence did not  
21 support a conspiracy to bleed the estate at the expense of  
22 unsecured creditors and then let the case be converted. The  
23 court noted that there were legitimate reasons for conversion,  
24 primarily Debtor's unwillingness to cooperate in reaching a  
25 consensual plan, and that Debtor had been given ample warning.  
26 These findings were not clearly erroneous.

1                   **c. Trustee's Failure to Maximize Return to Unsecured**  
2                   **Creditors**

3                   Debtor asserted that Trustee failed to maximize the return  
4                   for unsecured creditors and get a fresh start for Debtor. Debtor  
5                   contended that Trustee supported conversion to protect Ryder from  
6                   being sued by Debtor and was determined to put Debtor out of  
7                   business at any cost. The bankruptcy court found no evidence of  
8                   such motivation. To the contrary, the bankruptcy court found  
9                   that the evidence showed Trustee was trying to facilitate a  
10                  consensual plan and was finding obstacles on both sides, and that  
11                  ultimately the intransigence of the debtor led Trustee to "throw  
12                  up his hands." This finding is supported by the evidence and is  
13                  not clearly erroneous.

14                   **d. Trustee's Conspiracy to Set Up Default Terms to**  
15                   **End the Chapter 11 Case**

16                  Debtor alleged that at an early stage in the case, Ryder  
17                  knew that Bank Midwest wanted the case converted to chapter 7 and  
18                  that the dispute over default terms was set up as a way to end  
19                  the chapter 11 case. According to Debtor, Ryder got the Trustee  
20                  on the bank's "team," and Trustee instructed Bank Midwest to  
21                  prepare its own default terms that Trustee would support. The  
22                  bankruptcy court correctly found no evidence of any such  
23                  conspiracy.

24                   **e. Trustee's Failure to Operate Business**

25                  Debtor believed that Trustee was required under the terms of  
26                  the settlement with Bank Midwest to operate the business through  
27  
28

1 the sale date, but instead Trustee closed it down.<sup>21</sup> Thus,  
2 Debtor asserted that by shutting down the business Trustee failed  
3 to properly protect estate assets and creditors other than the  
4 bank and reduced the value of the business. The bankruptcy court  
5 found no wrongdoing on the part of Trustee in closing down the  
6 business, noting that it had authorized the shutdown from  
7 February 14, 2014 to July 22, 2014 because of the parties'  
8 inability to agree. The record reflects that Trustee took  
9 possession of the business and its cash on February 14, 2014 and  
10 initially decided to temporarily shut down the business.  
11 Thereafter, Trustee received inquiries from parties who were  
12 interested in purchasing the business even though it was not  
13 operating. Based on this interest, and considering the startup  
14 costs of reopening, Trustee determined that it was reasonable to  
15 sell the business without reopening. The bankruptcy court's  
16 finding that Trustee did not wrongfully close the business was  
17 not clearly erroneous.

18 **f. Trustee's Change of Position re: Conversion**

19 Debtor contended that Trustee's refusal to recommend  
20 confirmation in light of Debtor's objection to Ryder's fees

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21 <sup>21</sup> The settlement agreement provides, in relevant part:  
22

23 The Trustee shall undertake (with assistance from  
24 others whom he may engage) to continue or resume  
25 operation of Debtor's business as promptly as  
26 reasonably feasible, so as to facilitate sale (or other  
27 commercially reasonable disposition) of Estate property  
**as a going concern if doing so appears practicable and  
conducive to a net recovery more favorable than  
conventional liquidation.**

28 (Emphasis added).

1 violated the scope of Trustee's assignment, which was to help the  
2 court evaluate Debtor's plan in light of Bank Midwest's expected  
3 opposition. The bankruptcy court rejected this contention,  
4 noting that the breakdown between Debtor and his counsel signaled  
5 to Trustee that there was no effective prospect of  
6 reorganization.

7 Trustee's initial status report indicated that Debtor's  
8 business operations appeared to be reasonably solid and could  
9 likely support the proposed plan payments, and that Debtor was an  
10 experienced operator who had the support of a number of other  
11 creditors. Trustee asked for a brief continuance to permit him  
12 to negotiate with the parties. Trustee initially opposed  
13 conversion, although he did warn Ryder that Debtor should not be  
14 involved in drafting a plan. Trustee subsequently changed  
15 position and supported conversion, which Debtor contended  
16 supported an inference of conspiracy with Bank Midwest and Ryder.

17 The bankruptcy court found that Trustee justifiably changed  
18 position because of Debtor's dispute of Ryder's legal fees.  
19 Debtor had approved five interim fee awards. Late in 2013 Debtor  
20 decided that Ryder's fees were too high. Soon thereafter, Debtor  
21 began asserting that Ryder had agreed to work on the case for a  
22 fixed fee. This fee dispute caused Trustee to conclude that it  
23 was hopeless to expect a confirmable plan of reorganization  
24 because Debtor could not be trusted to carry out his obligations  
25 under the plan. Accordingly, the bankruptcy court found no  
26 evidence of wrongdoing or collusion in the Trustee's change of  
27 position.

28 We find no error in any of the bankruptcy court's findings.

1           **5. Intentional Interference with Prospective Economic**  
2           **Advantage - Trustee Defendants**

3           Debtor testified that Iman's potential lender denied her  
4 loan request after Trustee discovered the lender's identity.  
5 Debtor thus surmised that Trustee or his representative had  
6 called the lender and discouraged it from making the loan.  
7 Debtor presented as evidence a letter dated August 2, 2014 from  
8 John Arno, the agent who arranged the financing for Iman's  
9 purchase of the business. Arno stated in the letter that as of  
10 April 22, 2014, the lender had been ready to issue a commitment  
11 subject to a satisfactory environmental report but that when the  
12 environmental engineer arrived at the premises to conduct the  
13 inspection, a security guard at the premises contacted Trustee,  
14 who in turn contacted the lender before approving the inspection.

15           According to the letter, the environmental report indicated  
16 that no action was required, and Arno provided the additional  
17 documentation requested by lender. Nevertheless, the lender did  
18 not issue the commitment. Arno thus concluded that something  
19 said during the conversation between Trustee and the lender  
20 caused the lender to decide not to proceed with the loan.

21           Also admitted into evidence as attachments to the Arno  
22 letter were a copy of a commitment letter from GCA Financial  
23 confirming the availability of \$600,000 to Iman and copies of  
24 bank statements purportedly showing the availability of \$550,000  
25 in "family funds" for the purchase.

26           The bankruptcy court found that the more plausible reason  
27 the loan was not approved was that the amounts shown on the bank  
28 statements did not add up to the \$550,000 required by the lender,

1 and the availability of the funds "relied on the doubtful  
2 assumption that the family members would hand over all of their  
3 funds to the plaintiffs."<sup>22</sup> Noting that the Arno letter was  
4 hearsay, the bankruptcy court concluded that there was no  
5 credible evidence to support the allegations that Trustee  
6 sabotaged Iman's efforts to obtain funding to purchase the  
7 business. This finding was not clearly erroneous.

8 As the bankruptcy court repeatedly noted, all of Halloums'  
9 theories of liability are based on a misunderstanding of  
10 bankruptcy law, practice, and procedure. On appeal, Halloums  
11 have not demonstrated that any of the bankruptcy court's factual  
12 findings were clearly erroneous. In addition to making the same  
13 arguments that were presented in the bankruptcy court, they argue  
14 on appeal that the complaint stated "plausible claims for relief"  
15 and that the settlement between Trustee and Bank Midwest and  
16 order to return Iman's deposit are not preclusive. These  
17 arguments are not applicable because the bankruptcy court did not  
18 rule on the pleadings and because it did not rule on the  
19 preclusion issues raised by defendants.

#### 20 **CONCLUSION**

21 For the reasons set forth above, we deny Halloums' motion to  
22 suspend hearing and transfer venue.

23 We find no error in the bankruptcy court's denial of the  
24 Remand Motion. Dismissal of the claims against Trustee based on

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25  
26 <sup>22</sup> Some of the funds reflected on the bank statements were  
27 held at the National Bank of Abu Dhabi in United Arab Emirates  
28 Dirham currency. The bankruptcy court found that, given current  
exchange rates, the total amount of family funds identified in  
the admitted bank statements was less than \$478,000.



1 the Barton doctrine was harmless error.

2 We find no abuse of discretion in the bankruptcy court's  
3 denial of Halloums' request to conduct additional discovery, nor  
4 do we find error in the dismissal of Halloums' claims against all  
5 defendants on the merits.

6 Accordingly, we AFFIRM the judgment of dismissal.

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