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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-16-1218-JuFY)
))
 STEVEN JOHN WHARTON and) Bk. No. 2:14-bk-18455-ABL)
 JOSEPHINA JESSIE WHARTON,))
))
 Debtors.))
 _____))
))
 STEVEN JOHN WHARTON;))
 JOSEPHINA JESSIE WHARTON,))
))
 Appellants,))
 v.) **O P I N I O N**)
))
 LENARD SCHWARTZER, Chapter 7))
 Trustee,))
 Appellee.))
 _____))

Submitted without oral argument
on January 19, 2017*

Filed - February 13, 2017

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Appellants Steven John Warton & Josephina Jessie
Wharton on brief pro se; Jason A. Imes on brief
for appellee, Lenard Schwartzer, chapter 7
trustee.

Before: JURY, FARIS, and YUN,** Bankruptcy Judges.

* By order entered on November 7, 2016, a motions panel
determined that this appeal was suitable for submission on the
briefs and record without oral argument pursuant to Fed. R.
Bankr. P. 8019.

** Hon. Scott H. Yun, United States Bankruptcy Judge for the
Central District of California, sitting by designation.

1 JURY, Bankruptcy Judge:
2

3 Chapter 7¹ debtors, Steven John Wharton and Josephina
4 Jessie Wharton (collectively, Debtors), listed a 1965 Corvette
5 as a nonexempt asset in their initial schedules and showed that
6 Steven's brother, Robert Wharton (Robert), held a nonpurchase
7 money security interest in the vehicle. However, Robert's
8 security interest in the vehicle was not perfected under Nevada
9 law. Accordingly, the chapter 7 trustee, Lenard Schwartzner
10 (Trustee), sought turnover of the vehicle.

11 Debtors negotiated with Trustee to purchase the Corvette,
12 but these negotiations broke down over price and terms of
13 payment. Trustee filed a motion to compel turnover. Debtors
14 then amended their Schedules B and C to claim an exemption in
15 the full value of the Corvette, which was appraised at \$23,000.
16 Trustee objected to the exemption in his reply brief to the
17 turnover motion, but never filed a formal objection to the
18 exemption. Debtors claimed that Trustee's objection raised in
19 the reply was improper and thus no timely objection to their
20 exemption had been made.

21 After further briefing, the bankruptcy court decided the
22 matter on the basis of stipulated facts presented by the
23 parties. The court sustained Trustee's objection to Debtors'
24 claimed exemption in the Corvette under § 522(g)(1)(A), granted
25

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

1 Trustee's motion for turnover, and entered an order consistent
2 with its ruling. Debtors appeal from that order.

3 For the reasons set forth below, we AFFIRM.

4 **I. FACTS²**

5 Debtors owned a 1965 Corvette. In July 2011, Steven
6 borrowed \$80,000 from Robert. The loan was evidenced by a
7 promissory note signed by Steven and which stated, among other
8 things, that the note was partially secured by the Corvette. In
9 connection with the loan, Steven gave Robert the original title
10 certificate and keys to the vehicle but retained physical
11 possession. Throughout the relevant dates, Steven was listed as
12 the owner on the Corvette's title certificate.

13 Debtors filed their chapter 7 petition on December 30,
14 2014. Trustee was appointed to administer their bankruptcy
15 estate. Debtors listed the Corvette in their initial schedules
16 as a nonexempt asset with a value of \$63,800 and showed that
17 Robert held a nonpurchase money security interest on the
18 vehicle.

19 On March 26, 2015, Robert filed a proof of claim (POC) for
20 \$45,000, showing \$40,000 secured by the Corvette with the
21 remainder unsecured.

22 Trustee later determined that Robert had not perfected his
23 security interest in the Corvette prepetition under Nevada law
24 because his security interest neither appeared on the state-

25
26 ² Many of the facts are taken from the Stipulated Facts Re
27 Motion to Compel Turnover. To the extent necessary, we take
28 judicial notice of the pleadings filed in the underlying
bankruptcy case. Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 issued certificate of title nor was he listed as a lienholder.
2 Because the vehicle was in Steven's name and had not been
3 claimed as exempt, Trustee demanded turnover of the Corvette for
4 the benefit of the estate and creditors.

5 Robert amended his POC to include a copy of the promissory
6 note and cancelled check for the initial loan to Steven.
7 However, he provided no documents that showed his security
8 interest in the Corvette was properly perfected under Nevada
9 law.

10 During negotiations with Trustee over the Corvette, Debtors
11 had the vehicle appraised by CarMax in Bakersfield, California.
12 CarMax provided an "appraisal offer" of \$23,000, and Debtors
13 provided this offer to Trustee. Trustee agreed that Debtors
14 could pay the amount of the appraised value less the 20%
15 commission that it would cost him to sell the vehicle at
16 auction, resulting in a total price of \$18,400, with payments
17 made over twelve months. The negotiations later broke down over
18 the price and terms of payment.

19 As a result, Trustee filed a motion to compel turnover of
20 the Corvette (Turnover Motion), asserting that the vehicle was
21 property of the estate and that Robert's lien was unperfected.
22 Trustee informed the bankruptcy court that he had demanded
23 turnover of the Corvette or payment of its value by emails and a
24 letter but that Debtors failed to cooperate.

25 Two weeks before the scheduled hearing on the Turnover
26 Motion, Debtors filed amended Schedules B and C listing the
27 vehicle's value at \$23,000 based on the CarMax appraisal and
28 listing an exemption of this entire value under Nevada Revised

1 Statute (NRS) 21.090(1)(f).³ Debtors did not amend Schedule D
2 which showed that Robert held a secured interest in the vehicle.

3 Debtors also responded to the Turnover Motion, asserting
4 that they did not initially claim an exemption in the vehicle
5 because they believed that it was subject to a valid security
6 interest. They further stated that once the negotiations with
7 Trustee ended, they amended their schedules to reflect the
8 exemption in the Corvette.

9 In a subsequent reply, Trustee asserted that he could avoid
10 Robert's unperfected lien under §§ 544 and 550. He further
11 argued that Debtors could not exempt the Corvette based on the
12 provisions of § 522(g)(1)(A) because they had voluntarily
13 transferred a security interest to Robert, citing In re Bub, 528
14 B.R. 555 (Bankr. E.D.N.Y. 2015), and Glass v. Hitt (In re
15 Glass), 60 F.3d 565, 569 (9th Cir. 1995), in support.⁴

16 Debtors responded to the reply, arguing that there was no
17 transfer of the vehicle but only transfer of the title and the
18 keys. Therefore, according to Debtors, Trustee had not
19 "recovered" the vehicle from a third party since it was always
20 in Debtors' possession. Debtors also pointed out that there was
21 no attempt to defraud or mislead the bankruptcy court as the
22

23 ³ This subsection allows an exemption in one vehicle if the
24 judgment debtor's equity does not exceed \$15,000 or the creditor
is paid an amount equal to any excess above that equity.

25 ⁴ Glass stands for the proposition that the trustee
26 "recovers" property within the meaning of § 522(g) so long as
the trustee has taken some action resulting in the reconveyance
27 of the property of the estate. In re Glass, 60 F.3d at 568-69.
No formal adversary proceeding is required. Bub cites Glass and
28 other cases which hold the same.

1 vehicle had been listed in their schedules.

2 At the November 19, 2015 hearing on the Turnover Motion,
3 Trustee informed the bankruptcy court that Debtors had claimed
4 an exemption in the vehicle after he filed the motion. As a
5 result, Trustee suggested continuing the matter "about 30 days
6 and - or maybe 45 days," and stated: "I will file a[n]
7 objection to the claim of exemption that could be heard at the
8 same time as a motion to -- for turnover of the vehicle." The
9 bankruptcy court set the matter for a January 6, 2016 status
10 conference on Judge Landis's calendar⁵ since he was assigned the
11 case and an evidentiary hearing was required.

12 On January 11, 2016, the bankruptcy court scheduled the
13 matter for an evidentiary hearing on May 2, 2016. At the May 2,
14 2016 hearing, the parties advised the court that they had agreed
15 to submit the matter on the basis of stipulated facts. The next
16 day, the bankruptcy court entered an order setting May 9, 2016,
17 as the deadline for filing the stipulation regarding the
18 evidentiary record and closing the record as of that date. The
19 court also set further dates for the parties to file their post-
20 hearing briefs.

21 The parties filed the stipulated facts as required.
22 Trustee filed his post-hearing brief on May 16, 2016. Trustee
23 argued that he raised a timely and sufficient objection to
24 Debtors' claimed exemption in the Corvette under Rule 4003;
25 i.e., Debtors amended their schedules to claim the exemption on

26
27 ⁵ The November 19, 2015 hearing was before Judge Davis, who
28 as duty judge heard a status conference calendar of motions in
cases assigned to all judges in the division.

1 November 5, 2015, and he objected to the exemption on
2 November 12, 2015, in his reply brief to the Turnover Motion.
3 Accordingly, Trustee maintained that his objection was within 30
4 days of Debtors' amended Schedule C. Trustee further argued
5 that his objection satisfied Rule 4003, which does not require
6 any particular form for an objection to an exemption under the
7 holding in Spencer v. Siegel (In re Spencer), 212 B.R. 625, 629
8 (9th Cir. BAP 1997). According to Trustee, all that Rule 4003
9 requires is notice of Trustee's objection and its basis, which
10 must be raised within the applicable time period. Finally,
11 Trustee asserted that Debtors admitted in the stipulated facts
12 that they voluntarily transferred a security interest in the
13 vehicle to Robert. Under these circumstances, Trustee argued
14 that § 522(g)(1)(A) prevented them from claiming the Corvette as
15 exempt.

16 Debtors filed their post-hearing brief on May 23, 2016.
17 Debtors asserted that Trustee had failed to file a timely
18 objection to their exemption and that at no time during the
19 November 19, 2015 hearing did the bankruptcy court acknowledge
20 that Trustee's reply brief was an objection to Debtors'
21 exemption. They further argued that at the November 19th
22 hearing, Trustee was directed to file and place on calendar an
23 objection within 45 days. Debtors also pointed out that the
24 facts in Spencer were distinguishable from those here. In
25 Spencer, the trustee had filed a document entitled "Trustee's
26 Objection to the Two Individual Retirement Accounts Claimed as
27 Exempt by Debtor" within the 30 day period under Rule 4003. In
28 contrast, Trustee filed no pleading expressly objecting to

1 Debtors' claim of exemption in this case.

2 Debtors further asserted that § 522(g)(1)(A) was not
3 applicable as there was no transfer of a security interest in
4 the Corvette. According to Debtors, no transfer occurred
5 because the promissory note did not contain a sufficient
6 description of the collateral - a requirement for attachment
7 under NRS 104.9203. For this argument, Debtors relied on the
8 reasoning in Checkett v. Sutton (In re Sutton), 365 B.R. 900
9 (8th Cir. BAP 2007), In re Seibold, 351 B.R. 741 (Bankr. D.
10 Idaho 2006), and In re Dolven, 549 B.R. 386 (Bankr. D. Idaho
11 2016). Finally, Debtors contended that at all times they were
12 acting honestly and simply availed themselves of the exemption
13 provided to them under Nevada law.

14 On May 27, 2016, Trustee filed a response which reiterated
15 his previous arguments; i.e., his objection to Debtors'
16 exemption set forth in his reply brief was sufficient to meet
17 the requirements of Rule 4003 and § 522(g) applied.

18 On June 30, 2016, the bankruptcy court issued its oral
19 ruling. First, the court found that Trustee's reply brief in
20 support of the Turnover Motion was sufficient to constitute a
21 timely objection to Debtors' claim of exemption in the Corvette
22 under the holding in Spenler. Next, the bankruptcy court
23 sustained Trustee's objection to Debtors' claimed exemption in
24 the Corvette under § 522(g). According to the court, the
25 agreement between Steven and his brother showed the loan was
26 secured by the value of the Corvette. The bankruptcy court also
27 found that a transfer of the security interest occurred because
28 Debtors gave the title and keys to Robert. The court further

1 noted that Debtors had stipulated that the transfer was
2 voluntary. Finally, the bankruptcy court held that Trustee had
3 recovered the vehicle under §§ 544 and 550 for the benefit of
4 the estate through his actions since Debtors represented that
5 Robert had released his lien. In the end, the bankruptcy court
6 sustained Trustee's objection to the exemption and granted
7 Trustee's Turnover Motion.

8 On July 6, 2016, the bankruptcy court entered an order
9 consistent with its oral ruling. Debtors timely appealed from
10 that order.

11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
13 §§ 1334 and 157(b)(2)(A), (B) and (E). We have jurisdiction
14 under 28 U.S.C. § 158.

15 **III. ISSUES**

16 A. Whether the bankruptcy court erred in finding that
17 Trustee timely objected to Debtors' claimed exemption in the
18 Corvette under Rule 4003;

19 B. Whether the bankruptcy court erred in denying Debtors'
20 claimed exemption in the Corvette under § 522(g)(1)(A); and

21 C. Whether the bankruptcy court erred in granting
22 Trustee's Turnover Motion.

23 **IV. STANDARD OF REVIEW**

24 The issues raised in this appeal are subject to de novo
25 review. See In re Spenler, 212 B.R. at 628 (proper application
26 of Rule 4003(b) is a question of law which we review de novo);
27 Hitt v. Glass (In re Glass), 164 B.R. 759, 761 (9th Cir. BAP
28 1994); Graham Oil Co. v. Gordon C. York, Inc. (In re Kramer), 64

1 B.R. 531, 532 (9th Cir. BAP 1986) (whether the bankruptcy court
2 correctly applied the law to the stipulated facts is a legal
3 issue subject to de novo review); Gaughan v. Smith (In re
4 Smith), 342 B.R. 801, 805 (9th Cir. BAP 2006) (a debtor's right
5 to claim exemptions is question of law reviewed de novo); Conrad
6 v. Ace Prop. & Cas. Ins. Co., 532 F.3d 1000, 1004 (9th Cir.
7 2008) (interpretation and meaning of security agreements
8 (contracts) is de novo).

9 De novo means review is independent, with no deference
10 given to the trial court's conclusion. Charlie Y., Inc. v.
11 Carey (In re Carey), 446 B.R. 384, 389 (9th Cir. BAP 2011)
12 (citing McComish v. Bennett, 611 F.3d 510, 519 (9th Cir. 2010)).

13 **V. DISCUSSION**

14 On appeal, Debtors contend that the bankruptcy court erred
15 in granting Trustee's turnover request because the Corvette is
16 an exempt asset. Their arguments regarding the bankruptcy
17 court's error in denying their exemption essentially mirror
18 those made in the bankruptcy court. First, Debtors contend that
19 Trustee's objection to their exemption, which was raised for the
20 first time in his reply brief in connection with the Turnover
21 Motion, was not proper. According to Debtors, Trustee was
22 required to file a separate document objecting to their
23 exemption. Since the time has passed for doing so, Debtors
24 maintain that the court should have allowed their exemption.
25 Second, Debtors assert that § 522(g) is not applicable because
26 they disclosed the vehicle in their schedules and only took the
27 exemption after they obtained an appraisal and realized that
28 they had not fully used their vehicle exemption. We are not

1 persuaded by either of these arguments.

2 **A. Trustee's objection to Debtors' exemption was timely.**

3 Rule 4003(b) governs objections to claims of exemption and
4 states in relevant part:

5 (1) Except as provided in paragraphs (2) and (3), a
6 party in interest may file an objection to the list of
7 property claimed as exempt within 30 days after the
8 meeting of creditors held under § 341(a) is concluded
9 or within 30 days after any amendment to the list or
supplemental schedules is filed, whichever is later.
The court may, for cause, extend the time for filing
objections if, before the time to object expires, a
party in interest files a request for an extension.

10 If no objection is filed within the 30 day period
11 proscribed by Rule 4003(b), the debtor's claimed exemption is
12 valid. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). Taylor
13 dealt with the timeliness of an objection and not its
14 sufficiency. The panel addressed the sufficiency of an
15 objection in Spenler stating:

16 Rule 4003(b) proscribes no particular form for an
17 objection to exemption. Nevertheless the purpose
18 behind Rule 4003(b) is clear. Rule 4003(b) was meant
19 to provide the debtor with timely notice that the
trustee or other interested party objects to a
debtor's claimed exemption.

20 212 B.R. at 630.

21 In support of its reasoning, the Spenler panel cited
22 numerous cases where pleadings were "deemed objections" even
23 though they were not styled as an "objection to exemption." For
24 example, in Havas Leasing Co. v. Breen (In re Breen), 123 B.R.
25 357, 360 (9th Cir. BAP 1991), the panel held that a trustee's
26 motion for relief from the stay which in essence objected to the
27 debtors' claim that their truck was exempt as a tool of the
28 trade constituted an objection filed within the 30 day period

1 for purposes of Rule 4003(b).

2 In Young v. Adler (In re Young), 806 F.2d 1303, 1305 (5th
3 Cir. 1987), overruled on other grounds by Canfield v. Orso (In
4 re Orso), 283 F.3d 686 (5th Cir. 2002), the debtor amended his
5 statement of financial affairs to include an annuity as personal
6 property and claimed it exempt after the trustee had filed a
7 motion arguing that the annuity was part of the estate. The
8 Fifth Circuit found the motion filed by the trustee constituted
9 a timely objection, noting:

10 Debtor does not, and surely cannot, complain that he
11 did not have actual notice of Trustee's objections.
12 To allow Debtor to gain refuge behind Rule 4003(b)
13 when he amended his financial statement **in response** to
Trustee's objections would be to elevate form over
substance. We cannot countenance such a wooden
application of the Bankruptcy Rules.

14 Id. (emphasis in original).

15 Finally, in Applebee v. Brawn (In re Brawn), 138 B.R. 327,
16 333 (Bankr. D. Maine 1992), the debtor asserted a right to a
17 homestead exemption in his motion to avoid the judgment
18 creditors' lien against his homestead property. The judgment
19 creditors filed a response to the motion, stating that the
20 Debtor was not entitled to a homestead exemption. The judgment
21 creditors later filed a pleading styled "Objection to Exemption
22 Claim," which the debtor contended was untimely. The bankruptcy
23 court disagreed, finding that, although the judgment creditors
24 had not filed a distinct objection the first time around, they
25 manifested their intent to contest the debtor's homestead
26 exemption claim and effectively communicated that intent to him
27 and the court well within Rule 4003(b)'s 30-day period.

28 The holding in Spener is applicable to this case.

1 Although the better practice would have been for Trustee to file
2 a separate pleading styled as an objection to Debtors'
3 exemption, under Spencer he did not need to do so. Trustee set
4 forth the basis for his objection to Debtors' exemption in his
5 reply brief since Debtors had amended their Schedule C claiming
6 the exemption in response to Trustee's Turnover Motion.
7 Trustee's reply was filed within 30 days of Debtors' amending
8 their Schedule C and nowhere do Debtors complain that they did
9 not have notice of Trustee's objection. Nor could they claim no
10 notice when they responded to Trustee's objection to their
11 exemption prior to the November 19, 2015 hearing on Trustee's
12 Turnover Motion.

13 Finally, although Debtors contend otherwise, the November
14 19th hearing transcript does not convince us that the rule in
15 Spencer is inapplicable under these circumstances. The hearing
16 was a status conference and no substantive rulings were made.
17 Although Trustee offered to file a separate objection to
18 Debtors' exemption, the bankruptcy court did not order him to do
19 so. Accordingly, we hold that Trustee's objection to Debtors'
20 exemption in the Corvette was timely.

21 **B. Since the requirements of § 522(g) (1) (A) were met, Debtors**
22 **were not entitled to claim an exemption in the Corvette.**

23 Section 522(g) (1), in relevant part, provides:

24 [T]he debtor may exempt under subsection (b) of this
25 section property that the trustee recovers under
26 section 510(c) (2), 542, 543, 550, 551, or 553 of this
27 title, to the extent that the debtor could have
28 exempted such property under subsection (b) of this
section if such property had not been transferred, if-

(1) (A) such transfer was not a voluntary transfer of
such property by the debtor; and

1 (B) the debtor did not conceal such property

2 It is undisputed that Debtors did not conceal the Corvette,
3 so subsection (B) is not at issue. Rather, our analysis centers
4 on whether Debtors' grant of a security interest in the Corvette
5 to Robert, who failed to properly perfect that interest, was in
6 the nature of a voluntary transfer which prevents Debtors from
7 asserting an exemption in the vehicle upon Trustee's recovery of
8 the vehicle for the benefit of the estate. Without either a
9 transfer or recovery, § 522(g) (1) (A) is inapplicable.

10 **1. The Voluntary Transfer Element**

11 Whether Debtors transferred an enforceable security
12 interest in the Corvette to Robert is a matter of Nevada law.
13 See Butner v. United States, 440 U.S. 48, 54-55 (1979); Diamant
14 v. Kasparian (In re S. Cal. Plastics, Inc.), 165 F.3d 1243, 1248
15 (9th Cir. 1999) (to determine the validity, nature and effect of
16 a lien, courts must look to state law).

17 Under Nevada law, a "security agreement" is "an agreement
18 that creates or provides for a security interest."
19 NRS 104.9102(uuu). A "security interest," in turn, is "an
20 interest in personal property . . . which secures payment or
21 performance of an obligation. . . ." NRS 104.1201(ii). Under
22 the Uniform Commercial Code (UCC) as enacted in Nevada, a
23 security interest attaches to collateral when it becomes
24 enforceable against the debtor with respect to the collateral.
25 NRS 104.9203(1). A security interest is enforceable against the
26 debtor and third parties with respect to collateral only if:

- 27 (a) Value has been given;
28 (b) The debtor has rights in the collateral or the

1 power to transfer rights in the collateral to a
2 secured party; and

3 (c) One of the following conditions is met:

4 (1) the debtor has authenticated a security
5 agreement that provides a description of the
6 collateral⁶

7 NRS 104.9203(2). Unless the creditor's interest has attached to
8 the collateral, the creditor has no enforceable interest in the
9 collateral. Debtors have placed only subsection (c)(1) of NRS
10 104.9203(2) at issue in this appeal. Therefore, we consider
11 whether there is an authenticated security agreement that
12 provides an adequate description of the collateral.

13 The record shows that Steven signed a promissory note in
14 favor of Robert, dated July 1, 2011, and that a loan for \$80,000
15 was made by Robert to Steven. The last sentence of the note
16 states: "Principal and interest due is to be paid in full by
17 August 1, 2016. This note is partially secured by 1965 Corvette
18 automobile." Accordingly, the promissory note qualifies as a
19 security agreement which by its terms "creates or provides for a
20 security interest." NRS 104.9102(uuu); see also Nolden v. Plant
21 Reclamation (In re Amex-Protein Dev. Corp.), 504 F.2d 1056,
22 1059-60 (9th Cir. 1974) (finding promissory note qualified as a
23 security agreement). Furthermore, the note was signed by Steven
24 and was therefore authenticated. In re Schwalb, 347 B.R. 726,
25 745 (Bankr. D. Nev. 2006) ("'[S]igning' is 'authentication'
26 under the UCC"). In short, the requirement of an
27 authenticated security agreement was met. Debtors do not argue

28 ⁶ None of the other conditions listed in the statute are
relevant in this case.

1 otherwise on appeal.

2 Instead, Debtors state in conclusory fashion that they did
3 not have a security agreement with Robert, but rather only a
4 promissory note which did not contain a proper description of
5 the collateral. Debtors argue that without a proper description
6 of the collateral, Robert's security interest did not attach and
7 therefore was unenforceable. As a result, Debtors contend that
8 they did not make a transfer within the meaning of
9 § 522(g)(1)(A). We disagree with these assertions. As
10 explained below, Debtors did transfer a security interest to
11 Robert under controlling state law.

12 First, contrary to Trustee's assertion, Debtors did not
13 stipulate that they transferred a security interest to Robert.
14 Rather, they agreed that they scheduled the Corvette as subject
15 to a security interest held by Robert and that they "delivered
16 the original title certificate and keys to the Corvette to
17 Robert Wharton in July 2011."

18 Whether these facts constitute a "transfer" is a legal
19 conclusion controlled by Nevada law. These stipulated facts are
20 sufficient to show that Steven gave Robert an interest in the
21 1965 Corvette as a condition of obtaining the \$80,000 loan, and
22 that Robert held onto the title and keys to ensure repayment.⁷
23 These facts, coupled with the language in the promissory note,
24 show a "transfer" of "an interest in personal property [that]

25
26 ⁷ To the extent Debtors contend no "transfer" occurred
27 because they had physical possession of the Corvette, they are
28 mistaken. The "transfer" at issue is the transfer of the
security interest.

1 secure[d] payment . . . of an obligation." NRS 104.1201(ii).
2 There was thus a "transfer" of a security interest in the
3 Corvette to Robert under Nevada law and Debtors did agree that
4 it was voluntary. Debtors are bound by these stipulated facts.
5 See E.H. Boly & Son, Inc. v. Schneider, 525 F.2d 20, 23 n.5 (9th
6 Cir. 1975).

7 Second, Debtors' contention that the description of the
8 collateral in the promissory note was inadequate is
9 disingenuous. One treatise explains:

10 The principal function of the description requirement
11 is to enable the parties themselves to identify the
12 collateral, and if the parties to the agreement
13 understand what collateral was pledged, the security
14 interest cannot be challenged on the basis that the
15 agreement insufficiently describes the collateral.

16 79 C.J.S. Secured Transactions § 45 (June 2011). Here, there is
17 no doubt that the parties to the promissory note - Robert and
18 Steven - understood what collateral was pledged - the 1965
19 Corvette. Therefore, Debtors cannot challenge their transfer of
20 the security interest in the "1965 Corvette" on the basis that
21 the promissory note insufficiently described the collateral.
22 Moreover, a description of collateral under Nevada law is
23 sufficient when "it reasonably identifies what is described."
24 NRS 104.9108(1). This lenient description standard is met by
25 the description of the collateral as a "1965 Corvette".

26 In sum, Robert's security interest attached to the Corvette
27 as all the requirements for attachment under Nevada law were
28 met: value was given, Debtors had rights in the Corvette, and
29 Steven authenticated (signed) the promissory note (security
30 agreement) that provided an adequate description of the

1 collateral. Robert's lien against the Corvette was thus
2 enforceable. Moreover, Debtors agreed that they voluntarily
3 gave Robert a security interest. Accordingly, the voluntary
4 transfer element under § 522(g)(1)(A) has been met.

5 The case law cited by Debtors – Sutton, Seibold, and Dolven
6 – do not support a contrary conclusion regarding the transfer
7 element. As shown below, unlike here, in each of those cases no
8 security interest was ever created by the debtor's actions.
9 Accordingly, there was no transfer of an interest to avoid and
10 recover.

11 Sutton involved a Missouri statute which set forth the
12 requirements for attachment of a security interest which is
13 identical to Nevada's statute: i.e., value must have been
14 given; the debtor must have rights in the collateral; and the
15 debtor must have authenticated a security agreement that
16 provides a description of the collateral (a vehicle). In re
17 Sutton, 365 B.R. at 904. Similar to this case, a family member,
18 Mrs. Sutton's father, loaned money to the debtors to purchase a
19 vehicle. However, there was no underlying security agreement
20 and only a notation on the application for the title on the
21 vehicle which listed Mrs. Sutton's father as a lien holder. The
22 Suttons filed a chapter 7 petition and claimed the entire fair
23 market value of the vehicle exempt and also listed Mrs. Sutton's
24 father as a secured creditor in their Schedule D. Sometime
25 postpetition, the debtors sold the vehicle and the father
26 released whatever interest he had in the vehicle so the sale
27 could close.

28 After the debtors filed a chapter 7 petition, the trustee

1 sought to avoid the father's interest in the vehicle under
2 § 544(a) and also filed an objection to the debtors' claim of
3 exemption under § 522(g)(1)(A). The father conceded that he did
4 not have a security interest in the vehicle. The bankruptcy
5 court entered judgment in favor of the trustee on his action,
6 but overruled his objection to the debtors' exemption in the
7 vehicle in two separate orders. In the adversary order, the
8 court noted that the debtors had not authenticated a written
9 security agreement in favor of the father and thus the father
10 did not possess an interest in the vehicle. Although the
11 trustee filed the action under § 544(a) to avoid the lien, the
12 court's order did not grant a § 544 avoidance but instead
13 granted judgment for the trustee based on a declaration that no
14 security interest existed. Id. at 906.

15 In overruling the trustee's objection to the exemption, the
16 bankruptcy court found that since there was no valid security
17 agreement in favor of the father, the debtors did not make a
18 prepetition voluntary transfer of an interest in the vehicle to
19 him and thus § 522(g)(1)(A) was inapplicable. In short, since
20 there was no lien, there was nothing to avoid or recover and
21 thus § 522(g) was not applicable. On appeal, the bankruptcy
22 appellate panel affirmed, essentially following the same
23 reasoning as the bankruptcy court.

24 Similarly, Seibold involved a motor vehicle and the lack of
25 an authenticated security agreement. In re Seibold, 351 B.R. at
26 741. The chapter 7 trustee alleged that the debtor's father had
27 an "unperfected" security interest that could be avoided and
28 obtained a stipulation from him whereby the father surrendered

1 the certificate of title and agreed to file an unsecured claim.
2 The debtor then filed a second amended Schedule C, again
3 asserting an exemption in the vehicle and adding another
4 exemption in the car under a different Idaho statute. The
5 bankruptcy court ultimately ordered the debtor to give
6 possession of the vehicle to the trustee, who sold the vehicle
7 at auction.

8 After the sale, the debtor filed a motion seeking to
9 enforce her exemptions in the vehicle. The trustee contended
10 that § 551 applied to preserve the lien he had avoided for the
11 benefit of creditors. The bankruptcy court disagreed,
12 concluding that no security interest ever attached under
13 Article 9 of the UCC because there was never a written security
14 agreement authenticated by the debtor. The bankruptcy court
15 held that without the avoidance of an underlying lien, § 551 did
16 not apply. Accordingly, the court granted the debtor's motion
17 to enforce her exemption claims against the funds.

18 Last, in Dolven the bankruptcy court found that the
19 creditor-bank did not have a lien on real property owned by the
20 debtor because there was no writing containing a legal
21 description of the property - a requirement for a lien under
22 Idaho law. In re Dolven, 549 B.R. at 386. Again, since there
23 was no lien to avoid, the court found that the trustee had not
24 recovered anything to which § 522(g) was relevant.

25 Unlike any of these cases, Debtors had voluntarily
26 transferred a security interest in the Corvette to Robert which
27 had attached and was enforceable under Nevada law.

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1 **2. The Recovery Element**

2 Although Debtors transferred a security interest to Robert,
3 that interest was not perfected. Nevada law requires the
4 secured interest to appear on the state-issued certificate of
5 title. In re Schwalb, 347 B.R. at 746. That was not done here.
6 As a result, Robert's unperfected interest was subject to
7 avoidance under § 544⁸ and subject to recovery for the benefit
8 of the estate under § 550. The bankruptcy court properly found
9 Trustee had avoided the interest and recovered it for the
10 estate.

11 In its oral ruling, the bankruptcy court found that the
12 recovery requirement under § 522(g) had been met even though
13 Trustee had not filed an adversary proceeding. The court noted
14 that it was Trustee's Turnover Motion and the threat of using
15 his avoidance powers under § 544(a) which caused Debtors to
16 amend their Schedules to claim the Corvette exempt and show that
17 Robert's lien had been released. Since Debtors do not challenge

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19 ⁸ Section 544 provides in relevant part:

20 (a) The trustee shall have, as of the commencement of
21 the case, and without regard to any knowledge of the
22 trustee or of any creditor, the rights and powers of,
23 or may avoid any transfer of property of the debtor or
any obligation incurred by the debtor that is voidable
by--

24 (1) a creditor that extends credit to the
25 debtor at the time of the commencement of
26 the case, and that obtains, at such time and
27 with respect to such credit, a judicial lien
28 on all property on which a creditor on a
simple contract could have obtained such a
judicial lien, whether or not such a
creditor exists;

1 any of these findings on appeal, those arguments are deemed
2 waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

3 Moreover, the Ninth Circuit has held that the word
4 "recovers," as used in § 522(g), does not necessarily require a
5 formal adversary action or proceeding; rather, the ordinary
6 meaning of the word suggests that a trustee may "recover"
7 property in a number of ways, including by merely using the
8 threat of avoidance powers to induce a debtor or transferee to
9 return the property to the estate. In re Glass, 60 F.3d at 568.
10 In other words, "[t]he filing of the objection [to the
11 exemption] containing the threat to use avoidance powers which
12 resulted in the reconveyance of the property to the estate was
13 'some action'" taken by the trustee to recover the property.
14 Id. at 569.

15 In sum, all the requirements for application of
16 § 522(g)(1)(A) have been met. Accordingly, Debtors are unable
17 to claim an exemption in the Corvette.

18 **C. Ordering turnover of the vehicle was proper.**

19 With several exceptions not applicable here, under § 542, a
20 trustee may seek turnover of estate property. Section 542(a)
21 provides:

22 Except as provided in subsection (c) or (d) of this
23 section, an entity, other than a custodian, in
24 possession, custody, or control, during the case, of
25 property that the trustee may use, sell, or lease
26 under section 363 of this title, or that the debtor
27 may exempt under section 522 of this title, shall
28 deliver to the trustee, and account for, such property
or the value of such property, unless such property is
of inconsequential value or benefit to the estate.

27 Steven was the sole owner of the vehicle listed on the
28 title certificate and was in possession of the Corvette at all

1 times. Accordingly, on the petition date, the vehicle became
2 property of Debtors' estate whether it was exempt or not.
3 Taylor, 503 U.S. at 642 (property that is claimed as exempt is
4 included as property of the estate by § 541(a)). As the
5 bankruptcy court properly found, Debtors were not entitled to
6 exempt the Corvette under § 522(g)(1)(A). Therefore, the
7 bankruptcy court did not err in granting Trustee's Turnover
8 Motion.

9 **VI. CONCLUSION**

10 For the reasons stated above, we AFFIRM.
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