



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
January 03, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re:

JAIRO ALEJANDRO RODRIGUEZ,

Debtor.

DOUGLAS ROSS, M.D.,

Plaintiff,

v.

JAIRO ALEJANDRO RODRIGUEZ, an  
individual, et al.,

Defendants.

Case No. 18-14694-MKN

Chapter 7

Adv. Proc. No. 18-01085-MKN

Date: December 19, 2018  
Time: 9:30 a.m.

**ORDER REGARDING MOTION TO REMAND STATE COURT ACTION<sup>1</sup>**

On December 19, 2018, the court held a hearing on the Motion to Remand State Court Action ("Remand Motion") filed by Douglas B. Ross, M.D., an individual ("Ross").  
Appearances were noted on the record. After arguments were presented, the matter was taken under submission.

<sup>1</sup> In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "AECF No." are to the numbers assigned to the documents filed in the above-captioned adversary proceeding as they appear on the adversary docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRE" are to the Federal Rules of Evidence.

## BACKGROUND

On August 6, 2018, Jairo Alejandro Rodriguez (“Debtor”) filed a voluntary Chapter 7 petition (“Petition”). (ECF No. 1). The case was assigned for administration to panel Chapter 7 bankruptcy trustee Lenard E. Schwartzer (“Trustee”). A Notice of Chapter 7 Bankruptcy Case (“Bankruptcy Notice”) was mailed to all scheduled creditors. (ECF Nos. 40 and 44). The Bankruptcy Notice indicated that a meeting of creditors would be held on September 12, 2018, and that November 13, 2018, would be the deadline for creditors to file complaints objecting to the Debtor’s discharge, or, to determine dischargeability of certain debts.

On August 17, 2018, Debtor filed his schedules of assets and liabilities (“Schedules”) along with his statement of financial affairs (“SOFA”). (ECF No. 46). Both the Schedules and SOFA are signed by the Debtor under penalty of perjury. According to his Schedule A/B, Debtor has an interest in the following entities: CAF Medical, LLC dba Injury & Chronic Pain Center (“CAF Medical”), Rutishauser, LLC dba NLV Pain Management & Urgent Care (“Rutishauser”), Injury Medical Consultants, and Elite Firearms and Tactical, LLC.<sup>2</sup> He attests that the value of his interests in all of the entities is \$0.00. Debtor also lists an interest in unpaid wages of approximately \$550,000 owed to him by Rutishauser, LLC. In his Schedule A/B, he also attests that he has no claims against third parties, nor contingent and unliquidated claims of every nature, including counterclaims and rights to set off claims. According to his SOFA, Debtor was the subject of two lawsuits pending at the time he filed his Petition: Douglas B. Ross, M.D. v. Jairo Rodriguez, PAC, Case No. A-15-728577-B (“Ross Litigation”), and Michael Ladner v. Jairo Rodriguez, M.D., NLV Pain Management & Urgent Care, Case No. A-18-767642-C. Both lawsuits are for breach of contract and were filed in the Eighth Judicial District Court, Clark County, Nevada (“State Court”).

On the same date he filed his Petition, Debtor also filed a Notice of Removal (“Removal Notice”) with respect to the Ross Litigation. (ECF No. 7). Copies of the pleadings and record

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<sup>2</sup> On the same date, Debtor filed an amendment to his Petition identifying CAF Medical and Rutishauser as sole proprietorships and as health care businesses within the meaning of Section 101(27A). (ECF No. 48).

1 from the State Court also were filed along with the Removal Notice. (ECF Nos. 7 through 39).<sup>3</sup>  
 2 Upon removal, the action was assigned Adversary Proceeding No. 18-01085-MKN (“Removal  
 3 Adversary”). According to the State Court record, the original complaint in the Ross Litigation  
 4 was filed on December 4, 2015 and named numerous individuals and entities as defendants.<sup>4</sup>  
 5 Since that time, the universe of additional parties now include counter claimants, third party  
 6 plaintiffs, and third-party defendants, along with the plaintiff, the Debtor, and Rutishauser.<sup>5</sup>

7 On October 31, 2018, the Trustee filed and served a notice of assets and instructions for  
 8 creditors to file proofs of claim no later than January 29, 2019 (“Trustee Asset Notice”). (ECF  
 9 No. 83).

10 On November 13, 2018, Ross, who also is the plaintiff in the Ross Litigation,  
 11 commenced an adversary proceeding against the Debtor, denominated Adversary Proceeding No.  
 12 18-01123-MKN (“Ross Non-Dischargeability Proceeding”). In his adversary complaint, Ross  
 13 alleges that the Debtor’s obligations to him are excepted from a Chapter 7 discharge as a result

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15 <sup>3</sup> The court separately takes judicial notice under FRE 201 of the papers filed in Ross  
 16 Litigation. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg.,  
 17 LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams, 2012 WL 3962458, at \*1  
 18 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC  
Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

19 <sup>4</sup> The original complaint was framed as ten separate causes of action against some or all  
 20 of the named defendants, including breach of contract, tortious breach of the implied covenant of  
 21 good faith and fair dealing, fraudulent misrepresentation, breach of fiduciary duty, conspiracy,  
 22 embezzlement/theft/conversion, unjust enrichment, preliminary and permanent injunctive relief,  
 23 accounting, and constructive trust.

24 <sup>5</sup> On September 26, 2017, Ross filed a motion for leave to file an amended complaint.  
 25 The amended complaint consisted of the original ten separate causes of action and added an  
 26 additional cause of action for an accounting by several additional named defendants. On  
 27 November 1, 2017, that motion was granted. On November 6, 2017, a written order granting the  
 28 motion was entered. On June 15, 2018, Debtor and Rutishauser, filed a second amended answer  
 to the amended complaint, in which they included a counterclaim against Ross alleging seven  
 separate causes of action. The prayer of the counterclaim seeks damages and other relief. On  
 June 29, 2018, Ross filed a motion for leave to further amend the complaint in the Ross  
 Litigation. On August 2, 2018, the State Court granted the motion. The proposed second  
 amended complaint consists of the prior eleven causes of action and adds an additional cause of  
 action for an additional breach of contract. It does not appear that a written order was entered by  
 the State Court before the Debtor filed his Petition for Chapter 7 relief.

1 of misconduct encompassed by Sections 523(a)(2)(A), 523(a)(2)(B), and 523(a)(4). (AECF No.  
2 1).<sup>6</sup>

3 On November 14, 2018, an order of discharge (“Discharge Order”) was entered under  
4 Section 727. (ECF No. 87). As a result of the Discharge Order, Debtor’s personal liability for  
5 his prebankruptcy debts have been discharged, except for those to be determined in the Ross  
6 Non-Dischargeability Proceeding.

7 On November 16, 2018, Ross filed the instant Remand Motion (AECF No. 9) and noticed  
8 it to be heard on December 19, 2018. (AECF No. 10).

9 On December 4, 2018, Ross filed a separate motion for relief from stay (“MRAS”) (ECF  
10 No. 89) that was noticed to be heard on January 9, 2019. (ECF No. 92). The MRAS seeks  
11 authorization for Ross to proceed with the Ross Litigation in State Court.

12 On December 10, 2018, Debtor filed his opposition (“Opposition”) to the Remand  
13 Motion. (AECF No. 18).

14 On December 12, 2018, Ross filed a reply (“Reply”) in support of his Remand Motion.  
15 (AECF No. 19).<sup>7</sup>

16 On December 14 and 17, 2018, a joinder in the Debtor’s Opposition was filed by Align  
17 Chiropractic, a Nevada corporation (“Align Chiro”). (ECF No. 94; AECF No. 22).

## 18 DISCUSSION

19 At the hearing on the Remand Motion, counsel for the Debtor informed the court that  
20 Rutishauser, LLC had filed a separate Chapter 7 proceeding the preceding day. The court’s  
21 records indicate that a voluntary Chapter 7 petition was filed on behalf of Rutishauser on  
22 December 18, 2018, denominated Case No. 18-17397-BTB. The case was assigned to Chapter 7  
23 panel trustee Lenard E. Schwartzter, i.e., the same bankruptcy trustee in the Debtor’s case. The  
24 Chapter 7 petition for Rutishauser was signed by the Debtor as the owner of Rutishauser.

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26 <sup>6</sup> The impact of the Ross Non-Dischargeability Proceeding on the application of the  
discharge injunction to marital resources under Section 524(a)(3) may be significant.

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28 <sup>7</sup> On December 13, 2018, Debtor filed a motion to dismiss in the Removal Adversary that  
apparently was intended to be filed in the Ross Non-Dischargeability Proceeding. (AECF No.  
20). That motion was noticed to be heard on February 28, 2019. (AECF No. 21).

1 Because the Debtor's interest in the entity Rutishauser is at the very least property of the  
 2 Debtor's bankruptcy estate, however, the Debtor arguably had no authority to sign the Chapter 7  
 3 petition.<sup>8</sup> Moreover, if Rutishauser is in fact a sole proprietorship as attested by the Debtor, see  
 4 note 2, supra, it has no legal existence separate from the Debtor and would not qualify to file a  
 5 separate bankruptcy petition. In either event, because the Debtor has exercised control over  
 6 property of his bankruptcy estate without consent of the Trustee or prior authorization from this  
 7 court, his filing of the voluntary Chapter 7 petition violated the automatic stay under Section  
 8 362(a)(3). Because the filing of the Rutishauser petition violated the automatic stay, it is void ab  
 9 initio. See Schwartz v. U. S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992).

10 The Ross Litigation encompasses or once encompassed a variety of individuals and  
 11 entities who are not debtors or otherwise entitled to bankruptcy protection. The list of non-  
 12 debtor parties who currently are or have been involved in the Ross Litigation is extensive:  
 13 Douglas Ross MD PC, Infuze LLC, Stephen J. Massa, Beau McDougall, Align Chiropractic,  
 14 Michael H. Hamilton, Esq., Michael Hamilton Attorney at Law LLC, Silver State Lab LLC,  
 15 Candy Carillo RN,<sup>9</sup> Injury Medical Consultants LLC, Align Med (Alfreda) LLC, Align MSO  
 16 LLC, Ryan Kissing DC, Keith Quisberg DC, Michael D. Digregorio M.D., Thomas Alfreda Jr.  
 17 DO, Robert Ingham M.D., Shannon Beal, and, Michael Braunstein M.D.<sup>10</sup> Because these  
 18 individuals and entities are not debtors in this case, and the Petition was not filed under Chapter  
 19 13, the automatic stay under Section 362 and the co-debtor stay under Section 1301 does not  
 20 apply to any of them. Thus, the Ross Litigation was not stayed as to any of these parties when  
 21 the Petition was filed. Likewise, discovery from the Debtor as a percipient witness also was not  
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23 <sup>8</sup> On his Schedule C, Debtor did not claim an exemption in any of the entities he listed on  
 24 his Schedule A/B, including Rutishauser. The Trustee Asset Notice was filed and the Debtor's  
 25 interest in the entities has not been abandoned, by request or administratively through case  
 26 closure, under Section 554.

26 <sup>9</sup> Ross alleges in the State Court complaint that defendant Candy Carillo ("Carillo") is the  
 27 Debtor's spouse.

27 <sup>10</sup> These individuals and entities appear on the register of case information maintained by  
 28 the clerk of the State Court.

1 stayed.

2 In addition to the entities and individuals encompassed by the Ross Litigation, the  
3 proceeding also included the counterclaim that the Debtor and Rutishauer asserted against Ross  
4 before the Petition was filed. See discussion at note 5, supra. Although the Debtor did not  
5 disclose that claim in his Schedule A/B,<sup>11</sup> it is property of the Debtor's bankruptcy estate under  
6 Section 541(a)(1). See Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 705,  
7 707 (9th Cir. 1986). Because that counterclaim is an inseparable part of the Ross Litigation, the  
8 remand request has additional consequences to the bankruptcy case.

9 By the instant motion, Ross seeks to remand the Ross Litigation to the State Court  
10 pursuant to the bankruptcy removal statute. See 28 U.S.C. § 1452. Subsection (a) of that statute  
11 permits civil claims and causes of action to be removed to the court where a bankruptcy case is  
12 pending, while subsection (b) provides in pertinent part that "The court to which such claim or  
13 cause of action is removed may remand such claim or cause of action on any equitable ground."  
14 28 U.S.C. § 1452(b). In determining whether an equitable ground for remand exists, bankruptcy  
15 courts typically consider up to fourteen different factors. See Desert Palace, Inc. v. LLTQ  
16 Enterprises, LLC (In re Caesars Entertainment Operating Company, Inc.), 588 B.R. 233, 241 n.4  
17 (B.A.P. 9th Cir. 2018). Those factors include:

- 18 (1) the effect or lack thereof on the efficient administration of the
- 19 estate if the Court recommends [remand or] abstention; (2) extent to
- 20 which state law issues predominate over bankruptcy issues; (3)
- 21 difficult or unsettled nature of applicable law; (4) presence of related
- 22 proceeding commenced in state court or other nonbankruptcy
- 23 proceeding; (5) jurisdictional basis, if any, other than § 1334; (6)
- degree of relatedness or remoteness of proceeding to main bankruptcy
- case; (7) the substance rather than the form of an asserted core
- proceeding; (8) the feasibility of severing state law claims from core

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24 <sup>11</sup> Debtor's failure to disclose the alleged claim against Ross potentially has serious  
25 consequences to its prosecution. See Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d  
26 267, 271-72 (9th Cir. 2013) (discussing application of judicial estoppel to prevent assertion of  
27 claim that plaintiff-debtor failed to list in bankruptcy schedules); Wong v. Michaels Stores, Inc.,  
28 648 Fed.Appx. 594 (9th Cir. 2016) (judicial estoppel prevented former Chapter 13 debtor from  
pursuing wage-and-hour claims against former employer). Application of judicial estoppel to the  
Trustee, however, arguably is inappropriate if the Trustee has not been permitted to appear in the  
Ross Litigation.

1 bankruptcy matters to allow judgments to be entered in state court with  
 2 enforcement left to the bankruptcy court; (9) the burden on the  
 3 bankruptcy court's docket; (10) the likelihood that the commencement  
 4 of the proceeding in bankruptcy court involves forum shopping by one  
 5 of the parties; (11) the existence of a right to a jury trial; (12) the  
 6 presence in the proceeding of nondebtor parties; (13) comity; and (14)  
 7 the possibility of prejudice to other parties in the action.

8 Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 820 n. 18 (B.A.P. 9th Cir. 2009).

9 No single factor appears to be more important than another. Compare McCarthy v. Prince (In re  
 10 McCarthy), 230 B.R. 414, 418 (B.A.P. 9th Cir. 1999) ("Any of these, and a host of other reasons,  
 11 would justify an exercise of discretion to order remand under 28 U.S.C. § 1452(b).").

12 The court having considered the record concludes that the various remand factors, taken  
 13 as a whole, favor remand of the Ross Litigation to the State Court.

14 All of the causes of action asserted in the Ross Litigation are based on state law, rather  
 15 than bankruptcy law. The various legal theories are typical of those asserted in business cases  
 16 before the State Court. Deference to the application of state law by the State Court is warranted.  
 17 There is no independent jurisdictional basis for those actions to be adjudicated in federal court,  
 18 including this bankruptcy court. Moreover, even though Ross has commenced a separate  
 19 adversary proceeding against the Debtor under Section 523(a)(2) and 523(a)(4), he does not  
 20 consent to the bankruptcy court entering a final judgment with respect to his claims against the  
 21 non-Debtor parties in the Ross Litigation. See Reply at 2:23-25. The consent of any non-Debtor  
 22 defendants does not bind or constitute a waiver by Ross. The State Court record indicates that a  
 23 bench trial was scheduled for July 1, 2019, rather than a trial by jury. This circumstance  
 24 somewhat avoids the limitations on a bankruptcy court's ability to conduct a jury trial, but it does  
 25 not overcome the absence of consent by Ross. Compare Fed.R.Bankr.P. 9015(b) (requirement of  
 26 consent of the parties for the bankruptcy court to conduct a jury trial).

27 The specter of forum shopping is significant. The record indicates that shortly before the  
 28 Petition and Removal Notice were filed, an evidentiary hearing was scheduled on a motion to  
 hold the Debtor and various non-Debtor defendants, including Carillo, in civil contempt for  
 violation of a preliminary injunction previously issued by the State Court. After numerous



1 continuances, a three-day evidentiary hearing was scheduled for August 6 through 9, 2018. On  
2 August 1, 2018, Debtor and other non-Debtor defendants filed an emergency motion to continue  
3 the evidentiary hearing. The State Court scheduled a hearing on the emergency motion for  
4 August 7, 2018. Before that hearing could be held, however, Debtor filed his Chapter 7 petition.  
5 In ordinary circumstances, the automatic stay might have been sufficient to prevent further action  
6 against the Debtor. But the Debtor also removed the Ross Litigation to the bankruptcy court,  
7 which had the effect of preventing the State Court from conducting the hearing with respect to  
8 the non-Debtor defendants, including the Debtor's spouse. As a result, the State Court vacated  
9 the evidentiary hearing and other pending matters, subject to further proceedings in the  
10 bankruptcy court.

11 Proceedings to enforce a prior state court order typically are not subject to the automatic  
12 stay under Section 362(b)(4). That provision excepts from the automatic stay "the  
13 commencement or continuation of an action or proceeding by a governmental unit...to enforce  
14 such governmental unit's...police and regulatory power..." 11 U.S.C. § 362(b)(4). In this  
15 circuit, civil contempt proceedings brought to enforce a prior state court order imposing  
16 discovery sanctions fall within this provision. See Dingley v. Yellow Logistics, LLC (In re  
17 Dingley), 852 F.3d 1143, 1147 (9th Cir. 2017); In re Montee, 2018 WL 2176076, at \*4-5 (Bankr.  
18 D. Idaho May 10, 2018). A contempt proceeding to enforce a preliminary injunction previously  
19 issued by a state court certainly falls within this provision. In this instance, however, Debtor's  
20 removal of the entire Ross Litigation had the effect of depriving the State Court of authority to  
21 exercise its police or regulatory power to enforce its preliminary injunction. See In re Cedar  
22 Funding, 419 B.R. at 820.

23 These circumstances clearly support the exercise of this court's discretion to remand  
24 under 28 U.S.C. § 1452(b). Absent the Debtor's removal of the Ross Litigation, the automatic  
25 stay would have applied to the Debtor under Section 362(a)(1), subject to the police power  
26 exception under Section 362(b)(4). The automatic stay arising upon the filing of the Debtor's  
27 Petition would not have applied to Rutishauser, Carillo, nor any other non-Debtor party in the  
28 Ross Litigation. Moreover, the automatic stay arising from the Debtor's bankruptcy Petition



would have prevented continued prosecution of the Ross Litigation against the Debtor, but would not have prevented the Debtor from being required to testify or being subject to discovery with respect to claims against other parties. See Groner v. Miller (In re Miller), 262 B.R. 499, 505 (B.A.P. 9th Cir. 2001); Bartech Systems Int'l, Inc. v. Mobile Simple Solutions, Inc., 2018 WL 679905, at \*2 (D. Nev. Jan. 4, 2018). Instead, the Ross Litigation could have moved forward to trial with the only material question being its impact on the Ross Non-Dischargeability Proceeding. But even that question has marginal significance inasmuch as cause for relief from stay may exist under Section 362(d)(1) to allow pending state court litigation to conclude, with the question of dischargeability reserved to the bankruptcy court.<sup>12</sup> Compare Griffin v. Wardrobe (In re Wardrobe), 559 F.3d 932 (9th Cir. 2009) (relief from stay order permitted state court to enter judgment but not to make findings concerning dischargeability of debt under Section 523(a)(2)). See also Littlefield v. Holtkamp (Matter of Holtkamp), 669 F.2d 505 (7th Cir. 1982) (relief from stay granted to allow prepetition personal injury claim to proceed to judgment, but not enforced outside of Chapter XI proceeding). In essence, there was no material reason for the Ross Litigation to have been removed from the State Court. Retaining the matter in the bankruptcy court, with no prospect of entering an effective judgment in a manner acceptable to all of the litigants, simply interferes with the efficient administration of the Debtor's case.

**IT IS THEREFORE ORDERED** that the Motion to Remand State Court Action,

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<sup>12</sup>The MRAS filed by Ross seeks such relief and is scheduled to be heard on January 9, 2019. The court will separately address relief from stay in connection with that matter. Because the Ross Litigation includes the estate's counterclaim against Ross, see discussion at 6, supra, the Trustee also has an interest in that litigation going forward. The related question will be whether to stay the Ross Non-Dischargeability Proceeding pending the outcome of the Ross Litigation in State Court. The degree to which any findings made in the Ross Litigation have issue preclusive effect will depend on whether the state law theories reach identical elements underlying the nondischargeability claims pursued under Sections 523(a)(2) and 523(a)(4). See, e.g., Husky Int'l Electronics, Inc. v. Ritz, 136 S.Ct. 1581 (2016) (actual fraud that is nondischargeable under Section 523(a)(2)(A) can include fraudulent schemes that can be effected without a false representation); Scott v. Lewis (In re Lewis), 97 F.3d 1182 (9th Cir. 1996) (whether a relationship is a "fiduciary" one under Section 523(a)(4) is a question of federal law and the broad, general definition of "fiduciary" is inapplicable in the dischargeability context).

brought by plaintiff Douglas Ross, M.D., Adversary Docket No. 9, be, and the same hereby is,  
**GRANTED.**

Copies sent to all parties via CM/ECF ELECTRONIC FILING.

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