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U.S. DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In Re:
ERIC MWANGI and PAULINE
MWICHARO,

Debtors.

ERIC MWANGI and PAULINE
MWICHARO,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

2:11-CV-01753-PMP-GWF

BK-S-09-24057-BAM
Adv. No. 11-1022

OPINION

Presently before the Court is Appellants Eric Mwangi and Pauline Mwicharo's appeal of the bankruptcy court's order dismissing with prejudice their adversary proceeding against Appellant Wells Fargo Bank, N.A.

I. BACKGROUND

The following factual background is derived largely from the statement of facts as recited by the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") in In re Mwangi, 432 B.R. 812 (9th Cir. BAP 2010). On August 3, 2009, Appellants Eric Mwangi and Pauline Mwicharo filed a voluntary chapter 7 petition. At that time, Appellants held four accounts at Appellee Wells Fargo Bank, N.A. ("Wells Fargo") with an aggregate balance of \$17,075.06. Appellants' original Schedule B did not list two of the four accounts, and Appellants' original Schedule C did not claim an exemption for any of

1 the funds on deposit in the accounts. Appellants listed Wells Fargo as an unsecured creditor
2 for two debts totaling \$52,000.

3 When Wells Fargo learned of Appellants' bankruptcy filing, Wells Fargo placed
4 a "temporary administrative pledge" on all four of Appellants' accounts. Wells Fargo
5 placed the hold on the accounts pursuant to an internal standard procedure. Wells Fargo
6 expressly disclaimed that it placed the hold on the accounts to protect any setoff rights it
7 may have as an unsecured creditor.

8 After placing the hold on Appellants' accounts, Wells Fargo sent a letter dated
9 August 6, 2009, to the chapter 7 trustee requesting instructions as to whom Wells Fargo
10 should distribute the account funds. In the letter to the trustee, Wells Fargo stated that upon
11 the filing of the bankruptcy petition, the account funds became property of the estate and
12 thus were payable only to the trustee or upon the trustee's order. Wells Fargo informed the
13 trustee that Wells Fargo would maintain a hold on the funds until it received direction from
14 the trustee regarding the funds' disposition or until October 12, 2009, which was thirty-one
15 days after the scheduled first meeting of creditors.

16 That same date, Wells Fargo sent letters to Appellants' counsel advising that the
17 accounts no longer were available to Appellants because the funds were property of the
18 estate and that Wells Fargo had an obligation to preserve estate property and to follow the
19 trustee's directions with respect to estate property. The letters stated Wells Fargo had
20 requested instruction from the trustee and suggested Appellants potentially could expedite
21 matters by contacting the trustee.

22 On August 11, 2009, Appellants filed an amended Schedule B in which they
23 included all four accounts at Wells Fargo. Appellants also filed an amended Schedule C in
24 which they claimed an exemption in seventy-five percent of the value of each of the Wells
25 Fargo accounts, relying on Nevada Revised Statutes § 21.090(1)(g), which provides an
26 exemption for seventy-five percent of the debtor's disposable earnings. Neither the trustee

1 nor any other party, including Wells Fargo, ever objected to Appellants' claimed
2 exemptions in the accounts. On August 18, 2009, Appellants' counsel contacted Wells
3 Fargo to request that the hold be lifted because Appellants claimed an exemption in a
4 portion of the funds. Wells Fargo refused absent the trustee's agreement.

5 On August 27, 2009, Appellants filed a motion in the bankruptcy court seeking
6 sanctions pursuant to 11 U.S.C. § 362(k) against Wells Fargo based upon Wells Fargo's
7 alleged intentional violation of the automatic stay provisions in §§ 362(a)(3) and (a)(6).
8 The bankruptcy court denied this motion, concluding that exempt property never becomes
9 property of the bankruptcy estate, and Wells Fargo thus could not have violated the stay
10 because the stay applies only to property of the estate. The bankruptcy court also concluded
11 that Wells Fargo did not violate the stay because it took no action to collect, assess, or
12 recover a prepetition claim it had against Appellants.

13 Appellants appealed to the BAP and the BAP reversed. In re Mwangi, 432 B.R.
14 at 816. First, the BAP rejected Wells Fargo's argument that Wells Fargo's administrative
15 hold policy is authorized by the Supreme Court's decision in Citizens Bank of Maryland v.
16 Strumpf, 516 U.S. 16 (1995). 432 B.R. at 819. Second, the BAP concluded that property
17 remains property of the estate even if the debtor claims an exemption and even if no one
18 objects to the exemption. Id. at 821. However, the BAP concluded that a debtor who
19 claims an exemption has "an inchoate interest in the property." Id. The BAP thus rejected
20 the bankruptcy court's conclusion that Wells Fargo could not violate the automatic stay
21 with respect to the exempt funds. Id.

22 Next, the BAP rejected Wells Fargo's argument that by placing a hold on the
23 funds and requesting instructions from the trustee, Wells Fargo complied with its obligation
24 to turn over property of the estate to the trustee. Id. at 821-22. The BAP also rejected
25 Wells Fargo's argument that because the accounts belonged to the trustee, Appellants could
26 not compel Wells Fargo to turn over the funds to Appellants. Id. at 822. On this point, the

1 BAP stated that:

2 the failure to return property of the estate with knowledge of the
3 bankruptcy is a violation of both the automatic stay and of the turnover
4 requirements of the Bankruptcy Code. For that reason, we believe it is
5 irrelevant whether Wells Fargo's national policy of holding the account
6 funds until requested by the trustee to release them might have been in
7 technical compliance with § 542(b), an issue which we do not decide.

8 Id. at 822 (internal citation and quotation marks omitted). The BAP reasoned that because
9 any individual harmed by a willful violation of the automatic stay may recover actual
10 damages, and because Appellants had an inchoate interest in property of the estate,
11 Appellants "had standing to pursue sanctions for a stay violation." Id. at 822-23.

12 Next, the BAP concluded that Wells Fargo exercised control over estate property
13 because it "chose to hold the funds until a demand was made for payment that it alone
14 deemed appropriate." Id. at 823-24. According to the BAP, Appellants did not need to
15 "seek a determination from the bankruptcy court that they were eligible for the protection of
16 the automatic stay, that the trustee had abandoned the account funds to them, or that their
17 claim of exemption in a portion of the account funds was valid." Id. at 824. The BAP
18 concluded that Wells Fargo's policy improperly and in contravention of controlling legal
19 authority placed the burden on Appellants to obtain the return of property of the estate in
20 which they claimed an exemption. The BAP stated the following:

21 "[I]f persons who could make no substantial adverse claim to a
22 debtor's property in their possession could, without cost to themselves,
23 compel the debtor or his trustee to bring suit as a prerequisite to
24 returning the property, the powers of a bankruptcy court and its
25 officers to collect the estate for the benefit of creditors would be vastly
26 reduced." . . .

The impact of Wells Fargo's national policy is to turn on its
head the balance between rights of parties legislatively created. As a
result of the policy, every party, except Wells Fargo, whose rights are
impacted by the administrative freeze will need to take action.

27 Id. at 824 (quoting In re Del Mission Ltd., 98 F.3d 1147, 1151 (9th Cir. 1996)). Finally, the
28 BAP remanded to the bankruptcy court for a determination of whether Wells Fargo

1 willfully violated the stay, and if so, what, if any, damages to award Appellants.¹ Id. at 824-
2 25.

3 Upon remand, Appellants filed an adversary class action against Wells Fargo.
4 (ER 1.) The bankruptcy court granted Wells Fargo's motion to dismiss, with leave to
5 amend. (ER 7-24, 45-48.) Appellants filed an amended adversary class action complaint
6 alleging Wells Fargo violated the automatic stay in 11 U.S.C. § 362(a)(3), which Wells
7 Fargo again moved to dismiss. (ER 49-59, 102-121.) This time, the bankruptcy court
8 dismissed the adversary action with prejudice. (ER 196-206, 207-14.)

9 The bankruptcy court concluded that Appellants had no standing to pursue any
10 alleged stay violation with respect to the account funds because only the trustee has
11 standing to protect estate property. (ER 197.) The bankruptcy court further concluded that
12 Appellants could not allege an injury to any inchoate rights they had in the account funds
13 because Appellants had no basis to demand possession of the account funds from Wells
14 Fargo absent the trustee's agreement or approval unless and until the funds revested in
15 Appellants. (ER 198-99.) Because Appellants did not seek a court order confirming the
16 funds revested nor moved to compel the trustee to abandon the funds in the accounts, the
17 funds remained property of the estate to which Appellants had no right to possess superior
18 to that of the trustee. (ER 212.) In short, because Appellants had no right to possess the
19 account funds, Appellants could not allege an injury caused by Wells Fargo's refusal to
20 release the funds to Appellants. (ER 212-14.) The bankruptcy court therefore dismissed
21 the adversary complaint with prejudice. (ER 214.)

22 Appellants now appeal. Appellants contend the bankruptcy court erred because it
23 failed to acknowledge that Wells Fargo's conduct violated both the turnover provision,
24

25 ¹ While the present appeal was pending, the bankruptcy court denied Appellants' motion for
26 sanctions. (Request for Judicial Notice (Doc. #15).) Appellants have appealed that decision.
(Response to Request for Judicial Notice (Doc. #16).)

1 which the trustee may enforce, and the automatic stay, which Appellants may enforce.
2 Appellants contend that while the trustee has greater rights than Appellants to compel Wells
3 Fargo to turn over the funds, Appellants have greater than, or at least equal rights as, the
4 trustee to pursue Wells Fargo for violating the automatic stay. Appellants also contend the
5 bankruptcy court's decision is contrary to controlling legal authority which places the
6 burden on third party possessors to turn over property to the estate, not on the trustee or the
7 debtor to pursue those assets. Alternatively, Appellants argue that even if the trustee's
8 rights are superior, Appellants have standing to assert the trustee's rights. Moreover,
9 Appellants assert that even if the bankruptcy court's decision is correct at the outset of the
10 bankruptcy, once thirty days passed from the first meeting of creditors and no objections to
11 the exemptions were filed, the funds reverted in Appellants and they, not the trustee,
12 therefore had the right to possess the funds. Finally, Appellants contend that even if they
13 cannot pursue a claim under § 362(k), they may pursue damages under 11 U.S.C. § 105(a).

14 Wells Fargo responds that because Appellants had no right to possess the funds,
15 they suffered no injury from Wells Fargo's hold on the funds. Wells Fargo argues that
16 where a debtor claims an exemption in a particular dollar amount, the actual asset remains
17 property of the estate and the debtor has only a guarantee of payment in the dollar amount
18 of the claimed exemption. Wells Fargo contends this is particularly the case where the
19 exemption relates to a deposit account at a bank because a bank account is not a tangible
20 asset, it is the bank's promise to pay the party authorized to receive the benefit of the
21 promise. According to Wells Fargo, because Appellants did not take any action to get
22 either the trustee or the bankruptcy court to order the funds be distributed to Appellants, the
23 trustee retained control of the estate property and Appellants had no right to possess the
24 funds. Wells Fargo contends that if it had complied with Appellants' demands, it would
25 have violated its obligation to turn over all estate property to the trustee. Wells Fargo
26 further contends that while a party sometimes may pursue another party's rights, in the

1 bankruptcy context, the debtor does not have standing to bring claims belonging to the
2 trustee. Alternatively, Wells Fargo argues it complied with the turnover provisions and thus
3 did not violate the automatic stay as a matter of law.

4 II. STANDARD OF REVIEW

5 The Court reviews de novo the Bankruptcy Court's conclusions of law,
6 "including its interpretation of the Bankruptcy Code." In re Rains, 428 F.3d 893, 900 (9th
7 Cir. 2005). The Court reviews de novo whether a complaint fails to state a claim.
8 Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008).
9 Whether property is property of the estate is a question of law the Court reviews de novo.
10 White v. Brown (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008). The Court also
11 reviews de novo whether the automatic stay has been violated. In re Del Mission Ltd., 98
12 F.3d at 1150. The Court may affirm the bankruptcy court's decision "on any ground fairly
13 supported by the record." In re Warren, 568 F.3d 1113, 1116 (9th Cir. 2009).

14 This Court is not bound by the BAP's decision. In re Silverman, 616 F.3d 1001,
15 1005 (9th Cir. 2010). However, the BAP's decision constitutes "persuasive authority given
16 its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law
17 throughout the Ninth Circuit." Id. at 1005 n.1.

18 III. DISCUSSION

19 In considering a motion to dismiss, "all well-pleaded allegations of material fact
20 are taken as true and construed in a light most favorable to the non-moving party." Wylter
21 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). However,
22 the Court does not necessarily assume the truth of legal conclusions merely because they are
23 cast in the form of factual allegations in the plaintiff's complaint. See Clegg v. Cult
24 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption
25 against dismissing an action for failure to state a claim. Ileto v. Glock Inc., 349 F.3d 1191,
26 1200 (9th Cir. 2003). A plaintiff must make sufficient factual allegations to establish a

1 plausible entitlement to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

2 Such allegations must amount to "more than labels and conclusions, [or] a formulaic
3 recitation of the elements of a cause of action." Id. at 555.

4 The filing of a bankruptcy petition creates an estate, and the bankruptcy trustee is
5 required to marshal all of the estate's property for the estate's benefit. 11 U.S.C. §§ 541(a),
6 704. Property of the bankruptcy estate includes "all legal or equitable interests of the debtor
7 in property as of the commencement of the case." Id. § 541(a)(1). The trustee becomes the
8 representative of the estate, and the debtor has an obligation to surrender all property to the
9 trustee. Id. §§ 323, 521(a)(4).

10 Upon filing for bankruptcy, the debtor immediately obtains the protection of an
11 automatic stay pursuant to § 362(a). Section 362(a)'s automatic stay is aimed at preserving
12 the status quo "by precluding and nullifying post-petition actions, judicial or nonjudicial, in
13 nonbankruptcy fora against the debtor or affecting the property of the estate." In re
14 Chugach Forest Products, Inc., 23 F.3d 241, 243 (9th Cir. 1994) (quotation omitted). "The
15 stay protects the debtor by allowing it breathing space and also protects creditors as a class
16 from the possibility that one creditor will obtain payment on its claims to the detriment of
17 all others." Id. (quotation omitted). For example, § 362(a)(3) imposes an automatic stay on
18 "any act to obtain possession of property of the estate or of property from the estate or to
19 exercise control over property of the estate." Pursuant to § 362(k), "an individual injured
20 by any willful violation of a stay provided by this section shall recover actual damages,
21 including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive
22 damages."

23 In addition to the breathing space provided by the automatic stay provision, the
24 trustee's effort at gathering property of the estate is aided by the turnover provisions in
25 § 542. Specifically as relevant to this case, § 542(b) provides that "an entity that owes a
26 debt that is property of the estate and that is matured, payable on demand, or payable on

1 order, shall pay such debt to, or on the order of, the trustee, except to the extent that such
2 debt may be offset under section 553 of this title against a claim against the debtor.”

3 Although the debtor is required to turn over all property to the trustee, the debtor
4 may claim some estate property as exempt from distribution to creditors. 11 U.S.C. § 522.
5 To do so, the debtor must file a list of property that the debtor claims is exempt. Id.
6 § 522(l). Creditors and the trustee must object to any claimed exemption within thirty days
7 of the first meeting of creditors. Otherwise, the property claimed to be exempt “is exempt,”
8 even if the debtor had no colorable basis for claiming the exemption or the claimed
9 exemption exceeds what the relevant provision permits. Fed. R. Bankr. P. 4003; see also 11
10 U.S.C. § 522(l); Schwab v. Reilly, 130 S. Ct. 2652, 2658 (2010); Taylor v. Freeland &
11 Kronz, 503 U.S. 638, 643-44 (1992).

12 The estate does not relinquish property until it is administered in the bankruptcy
13 proceeding, the bankruptcy case is closed, or the estate abandons the property under 11
14 U.S.C. § 554. In re Gebhart, 621 F.3d 1206, 1212 (9th Cir. 2010); In re McLain, 516 F.3d
15 301, 315 (5th Cir. 2008) (“[P]roperty that is entitled to be exempted is initially regarded as
16 estate property until it is claimed and distributed as exempt.” (quotation omitted)).
17 However, the statute does not unambiguously set forth when exempt property passes out of
18 the estate and becomes the debtor’s separate property. There are several possibilities,
19 including upon the filing of the claim for exemption, upon the passage of thirty days after
20 the first meeting of creditors if no objection is filed, upon resolution of any objection if one
21 is filed, upon the trustee’s abandonment of property under § 554, upon court order that the
22 claimed property is the debtor’s property, upon discharge, or upon the closing of the
23 bankruptcy case.

24 The Court rejects the proposition that a debtor’s mere claim of an exemption
25 removes that property from the estate. Under § 522(l), the debtor files a list of property the
26 debtor “claims as exempt,” and “[u]nless a party in interest objects, the property claimed as

1 exempt on such list is exempt." Consequently, the debtor only "claims" an exemption and
2 other interested parties are given an opportunity to object. This is reflected in Federal Rule
3 of Bankruptcy Procedure 4003(b)(1), which provides that an interested party must file an
4 objection within thirty days after the first meeting of creditors, or thirty days after the debtor
5 files an amended list of claimed exemptions, whichever is later. If an interested party
6 objects, the bankruptcy court "shall determine the issues presented by the objections." Fed.
7 R. Bankr. P. 4003(c). However, if no one objects, under § 522(l) the property "is exempt."
8 Based on this statutory language and Rule 4003, the Court concludes that if no one timely
9 objects to a debtor's claimed exemption, then the property is exempt from property of the
10 estate and passes to the debtor upon expiration of the time to object.

11 This construction prevents confusion and potential unwarranted liability on the
12 part of third party possessors of estate property. A third party possessor of estate property
13 would face the untenable position of deciding whether (1) to comply with the turnover
14 obligations in § 542 and face potential liability to the debtor claiming an exemption if it
15 turns out the property is exempt, or (2) accede to the debtor's demands to control the
16 property and face liability to the trustee for violating its turnover obligation if any objection
17 to the claimed exemption is upheld. Once the debtor's right to the exemption is established,
18 this tension between potential competing claims to ownership no longer exists.

19 However, where the statute permitting the debtor to claim a particular exemption
20 does not allow the debtor to exempt the entire property interest, but instead permits
21 exemption of an interest in the property up to a particular dollar amount, "what is removed
22 from the estate is an 'interest' in the property equal to the value of the exemption claimed at
23 filing." *In re Gebhart*, 621 F.3d at 1210. In such cases, the underlying asset remains
24 property of the estate, and the estate does not relinquish the property until it is administered
25 in the bankruptcy, the trustee abandons the property, or the bankruptcy case is closed. *Id.* at
26 1210, 1212; *Schwab*, 130 S. Ct. at 2667 ("Where a debtor intends to exempt nothing more

1 than an interest worth a specified dollar amount in an asset that is not subject to an
2 unlimited or in-kind exemption under the Code . . . [and] an interested party does not object
3 to the claimed interest by the time the Rule 4003 period expires, title to the asset will remain
4 with the estate pursuant to § 541, and the debtor will be guaranteed a payment in the dollar
5 amount of the exemption.").

6 Here, even assuming Appellants had an inchoate right to the account funds as the
7 BAP held, Appellants cannot allege a plausible injury from Wells Fargo's hold on the funds
8 between the date Appellants filed the amended Schedule C and thirty days following the
9 first meeting of creditors. Appellants had no right to possess the funds, as the funds were
10 property of the estate during this period and thus subject to the trustee's sole control.
11 Because Appellants had no right to possess the funds, Appellants could not be injured by
12 Wells Fargo's refusal to turn the funds over to Appellants. Moreover, Appellants have no
13 standing to pursue the trustee's turnover rights under § 542 during this, or any other, period
14 of time because the "bankruptcy code endows the bankruptcy trustee with the exclusive
15 right to sue on behalf of the estate." Estate of Spirtos v. One San Bernardino Cnty. Superior
16 Ct. Case Numbered SPR 02211, 443 F.3d 1172, 1176 (9th Cir. 2006); see also In re Eisen,
17 31 F.3d 1447, 1451 n.2 (9th Cir. 1994).

18 Appellants also cannot state a plausible entitlement to relief under 11 U.S.C.
19 § 362(k) for a violation of § 362(a)(3) after thirty days following the first meeting of
20 creditors because at that point, the property Appellants claimed as exempt passed out of the
21 estate and became Appellants' separate property. Section 362(k) provides a cause of action
22 for an individual injured by a willful violation of the automatic stay, and the automatic stay
23 in § 362(a)(3) applies only to property of the estate. Because the exempt property vested
24 in Appellants, it no longer was property of the estate subject to the automatic stay. See 11
25 U.S.C. § 362(c); In re Kretzer, 48 B.R. 585, 587-88 (Bankr. D. Nev. 1985) (holding
26 repossession of a truck did not violate the automatic stay because the truck was no longer

1 estate property where debtors claimed it as exempt, no party in interest objected, and truck
2 therefore reverted in the debtors).

3 Although Wells Fargo contends the bank accounts remained in the estate and
4 Appellants had a claim only to an interest in the accounts, the Court disagrees. Schwab and
5 Gebhart analyzed exemptions which, by their plain terms, allowed the debtor to claim only
6 an "interest" in property. Schwab, 130 S. Ct. at 2657, 2662-63 (debtor claimed an
7 exemption under § 522(d)(6) for an "aggregate interest, not to exceed" a certain dollar
8 amount in value of business equipment); Gebhart, 621 F.3d at 1208, 1210 (one debtor
9 claimed the exemption pursuant to an Arizona statute allowing a homestead exemption for
10 "[t]he person's interest in real property" not to exceed \$100,000 and the other claimed a
11 similar exemption under § 522(d)(1) for "[t]he debtor's aggregate interest, not to exceed
12 [\$36,900] in value, in real property").

13 In contrast, Appellants here claimed an exemption under Nevada Revised
14 Statutes § 21.090,² which provides:

15 The following property is exempt from execution, except as otherwise
16 specifically provided in this section or required by federal law:

17 (g) For any workweek, 75 percent of the disposable
18 earnings of a judgment debtor during that week, or 50
19 times the minimum hourly wage prescribed by section
20 6(a)(1) of the federal Fair Labor Standards Act of 1938,
21 29 U.S.C. § 206(a)(1), and in effect at the time the
22 earnings are payable, whichever is greater. . . . As used
23 in this paragraph:

(1) "Disposable earnings" means that part
of the earnings of a judgment debtor
remaining after the deduction from those
earnings of any amounts required by law to
be withheld.

24 ² Section 522(b) "provides three alternatives for defining exempt property: (1) the federal
25 'laundry list' of exempt property that is contained in subsection (d); (2) the federal list as expressly
26 modified by State law; or (3) the list of exemptions as defined by the State without reference to the
federal list." In re Breen, 123 B.R. 357, 359 (9th Cir. BAP 1991). Nevada has defined its own
exemptions without reference to the federal exemptions. Nev. Rev. Stat. §§ 21.090(1), 21.090(3).

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(2) "Earnings" means compensation paid or payable for personal services performed by a judgment debtor in the regular course of business, including, without limitation, compensation designated as income, wages, tips, a salary, a commission or a bonus. The term includes compensation received by a judgment debtor that is in the possession of the judgment debtor, compensation held in accounts maintained in a bank or any other financial institution or, in the case of a receivable, compensation that is due the judgment debtor.

Nev. Rev. Stat. § 21.090(1)(g). The particular Nevada exemption at issue here does not define the exempt property as an "interest" in disposable earnings up to a certain dollar amount. Rather, the exemption provides that seventy-five percent of the disposable earnings are exempt. Appellants claimed those earnings as exempt and no one timely objected. At that point, seventy-five percent of the compensation maintained in the bank accounts passed out of the estate to Appellants. Appellants therefore cannot state a claim under § 362(k) for a violation of the automatic stay under § 362(a)(3) for Wells Fargo exercising control over something that no longer was estate property.

Even if the Court is incorrect and Schwab and Gebhart control, Appellants cannot state a plausible injury. If Appellants had an interest in estate property, they had no right to possess or control the actual assets in the estate until their interest was administered and distributed to them in some fashion, either through the trustee's agreement, abandonment, order of the court, or the closing of the case. Appellants do not allege any of these things occurred which would have entitled them to an enforceable right to the funds such that Wells Fargo violated the automatic stay. Appellants had no immediate right to possess the funds or access the accounts absent the trustee's agreement and Appellants thus could not have been injured by Wells Fargo's hold on the funds, as discussed above.

///

1 Finally, even if the Court is incorrect about all of its above conclusions, the Court
2 may affirm the bankruptcy court on any basis supported by the record. Even if Appellants
3 could allege a plausible injury, Wells Fargo did not violate the automatic stay under
4 § 362(a)(3) as a matter of law. A bank does not exercise control over property of the estate
5 within the meaning of § 362(a)(3) when it refuses or fails to perform on its contractual
6 obligation to pay the owner of the account.³ Strumpf, 516 U.S. at 21. The contention that a
7 bank exercises control over estate property--

8 might be arguable if a bank account consisted of money belonging to
9 the depositor and held by the bank. In fact, however, it consists of
10 nothing more or less than a promise to pay, from the bank to the
11 depositor, and [the bank's] temporary refusal to pay was neither a
12 taking of possession of [the debtor's] property nor an exercising of
13 control over it, but merely a refusal to perform its promise.

14 Id. (internal citations omitted).⁴ Wells Fargo therefore did not violate § 363(a)(3) by
15 refusing to perform on its promise.

16 For all of the reasons expressed above, Appellants also cannot state a plausible
17 entitlement to relief under 11 U.S.C. § 105(a). Pursuant to § 105(a), the bankruptcy court
18 "may issue any order, process, or judgment that is necessary or appropriate to carry out the
19 provisions of this title." Because Appellants cannot allege an injury, or, alternatively,

20 ³ The Court expresses no opinion on whether Wells Fargo violated its turnover obligations
21 under § 542(b).

22 ⁴ See also Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("The relationship of bank and
23 depositor is that of debtor and creditor, founded upon contract."); In re Bakersfield Westar Ambulance
24 Inc., 123 F.3d 1243, 1246 (9th Cir. 1997) ("By depositing money into a bank account, the depositor
25 enters a debtor-creditor relationship with the bank. Title to the funds passes to the bank, and the
26 depositor receives a contract claim against the bank for an amount equal to the account balance."
(internal citation omitted)); In re Bernard, 96 F.3d 1279, 1282 (9th Cir. 1996) ("As between the bank
and the depositor such money becomes the property of the bank and the bank becomes the debtor of
the depositor for the amount deposited." (quotation omitted)); In re Randolph Towers Coop., Inc., 458
B.R. 1, 3 (Bankr. D. Col. 2011) ("If a party to a contract with a debtor refuses to perform the contract
because the debtor is in bankruptcy, that may be a breach of contract but it is not an exercise of control
over property of the estate.").

1 because Wells Fargo did not violate any provision of the bankruptcy code for which
2 Appellants have standing to sue, Appellants also cannot state a claim under § 105(a).

3 **IV. CONCLUSION**

4 Appellants either cannot allege an injury or cannot allege Wells Fargo violated
5 the automatic stay in 11 U.S.C. § 362(a)(3). The decision of the bankruptcy court
6 dismissing their adversary action with prejudice is therefore AFFIRMED.

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8 DATED: April 6, 2012

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10 PHILIP M. PRO
United States District Judge

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