UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: DAVID LEE SMITH and MARY JULIA HOOK, Debtors.	Bankruptcy Case No. 17-16354 TBM Chapter 7
DAVID LEE SMITH and MARY JULIA HOOK, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Adv. Pro. No. 18-01248 TBM

ORDER GRANTING UNITED STATES' MOTION FOR PARTIAL DISMISSAL AND ORDER TO SHOW CAUSE WHY THIS COURT OUGHT NOT DISMISS THE REMAINING CLAIMS

THIS MATTER comes before the Court on the "United States' Motion for Partial Dismissal" (Docket No. 11, the "Motion") and the "Debtors'/Plaintiffs' Response in Opposition to United States' Motion for Partial Dismissal" (Docket No. 13, the "Opposition"). The United States of America (the "Defendant") filed its Motion instead of filing a responsive pleading to the Debtors' "Complaint and Jury Demand" (Docket No. 1,[1] the "Complaint").

I. Introduction and Factual Background.

The Plaintiffs in this action are David Lee Smith ("Smith") and Mary Julia Hook ("Hook") (the "Debtors"). They are the debtors in a Chapter 7 case *In re Smith and Hook*, Case No. 17-16354 TBM (Bankr. D. Colo.) (the "Main Case"). They are proceeding without counsel but both are attorneys. Thus, this Court "need not afford (their) filings the liberal construction ordinarily given to pro se pleadings." *Hook v. U.S.*, 624 Fed. Appx. 972, 976 (10th Cir. 2015); *LNV Corp. v. Hook*, 2015 WL 7962971, at *3 (D. Colo. Dec. 3, 2015).

[1] Except when noted otherwise, the convention "Docket No. ____" refers to the number which corresponds to the document in the CM/ECF docket for this Adversary Proceeding.

The Debtors filed their Chapter 7 case on July 11, 2017. The indications are that the Debtors filed their case to thwart the efforts of their secured lender, LNV Corporation ("LNV"), to foreclose on the Debtors' residence. The Debtors, LNV and the United States have been involved in a judicial foreclosure proceeding initiated by LNV. That action is now pending in the United States District Court for the District of Colorado (the "District Court") in the case of *LNV Corporation v. Hook*, Civ. Action No. 14-cv-00955 (D. Colo.) (the "*LNV* Action" or the "*LNV* Court"). Particularly, the record of that case reveals that the District Court entered an order on June 28, 2017 authorizing the judicial foreclosure of the Debtors' residence. (Docket No. 320 in the *LNV* Action.)

Prior to the *LNV* Action, the Debtors, as tax payers, commenced an action against the United States seeking a refund or credit in the amount of $1 million for overpayment of taxes for tax years 1992-1996 and 2001-2006 in the case of *Smith v. United States*, Civ. Action No. 13-cv-01156 RM-KLM (D.Colo.) (the "*Smith* Case" or "*Smith* Court"). The Debtors also sought a release of all federal tax liens against their residence which is the subject of the LNV foreclosure.

When the Debtors filed their Chapter 7 case, they listed LNV and the United States as creditors. The filing of their bankruptcy case stayed the *LNV* Action. Eventually, however, LNV obtained an order granting it relief from stay to continue with the *LNV* Action. (Docket No. 50 in the Main Case.)

Thereafter, the bankruptcy case proceeded uneventfully. Both LNV and the United States filed proofs of claim in the bankruptcy case. Later, on November 8, 2017, the Debtors received a discharge (Docket No. 54 in the Main Case, the "Discharge Order"). Litigation ensued in this Court when the Chapter 7 Trustee (the "Trustee") filed his Final Report.

On June 29, 2018, the Trustee filed a Final Report (Docket No. 61 in the Main Case, the "Initial Final Report"). The Debtors objected to that Initial Final Report (Docket No. 66 in the Main Case, the "Objection") and, on August 2, 2018, the Court overruled the Debtors' Objection. On September 4, 2018, the Trustee filed his "Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to be Discharged" (Docket No. 75 in the Main Case, the "Final Report"). The Debtors did not file a further objection and the Court closed the Debtors' Main Case on October 5, 2018. (Docket No. 80 in the Main Case.)

The record, including the Final Report, reveals that the Trustee collected total gross receipts of $1,053.99 for the bankruptcy estate, of which $485.89 was paid for Administrative Expenses of the Trustee and the remaining $568.10 was paid as a partial distribution on the $520,668.76 Priority Unsecured Claims of the IRS. That left nothing to pay the approximately $839,000.00 of General Unsecured Claims filed in this case. Furthermore, it is evident from the Final Report that the Debtors scheduled claims against the IRS for tax refunds in excess of $1,000,000 and damages of over $5,000,000, but the Trustee elected not to pursue them. Upon closing of the case, such claims were abandoned to the Debtors by operation of 11 U.S.C. § 554(c).

II. The Debtors' Complaint.

On August 3, 2018, the day after this Court rejected the Debtors' challenge to the Trustee's Initial Final Report, the Debtors filed their Complaint against the Defendant. The Debtors' Complaint is a jumble of vague assertions. To complicate matters, the Debtors incorporated into the Complaint by reference the "Verified Answer of Defendant M. Julia Hook to the Amended Cross Claim of the United States of America; Affirmative Defenses and Compulsory Counterclaims; and Jury Demand" (Docket Nos. 1 and 3). The *LNV* Action is pending before the United States District Court for the District of Colorado (the "District Court") and the Debtors have appealed to the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") several of the District Court's orders.

The Defendant complains, rightfully, that the Debtors "generally disregard Rule 10's requirements that factual allegations be made in numbered paragraphs and that claims based on separate sets of circumstances be asserted as separate counts." Motion at 2. Nevertheless, the Defendant discerned seven "requests for relief" and assigned numbers to them as follows:

1. A request for refund of federal taxes in excess of $1 million;
2. Disallowance of the IRS's proof of claim;
3. Quiet title to the Debtors' real and personal property;
4. An award of damages based on alleged misconduct by the Defendant, including fraud in the *LNV* Action;
5. An award of damages based on alleged violations of the discharge injunction by the Defendant;
6. An award of damages based on alleged violation of the automatic stay by the Defendant; and
7. Request for determination of dischargeability of federal taxes.

Id.

III. The Defendant's Motion for Partial Dismissal.

Based upon its categorization of the relief the Debtors seek, the Defendant moves to dismiss Claims 1 - 4 arguing they are barred on jurisdictional and *res judicata* grounds; and to dismiss Claim 5 because it fails to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) (made applicable to adversary proceedings by Fed. R. Bankr. P. 7012(b)) ("Rule 12(b)(6)"). More specifically, the Defendant asserts that the Debtors' "conclusory allegations are devoid of any supporting factual averments." *Id*. at 11. "With respect to Claim (5), Smith and Hook fail to allege that the United States took any act against them personally after the discharge was awarded." *Id*. at 3. For reasons known only to the Defendant, the Defendant does not move to dismiss what it has identified as Debtors' Claim 6 (requesting an award of damages for the Defendant's willful violation of the automatic stay of Section 362 of the Code) and Claim 7 (for declaratory relief that the "taxes and penalties owed to governmental units" are discharged and have been discharged (Complaint at 5) in the Debtors' Main Case).

Thereafter, the Defendant's Motion reads like a math word problem. The Defendant contends the Court should dismiss Claims 1 *through* 4 under Rule 12(b)(6) "because these claims are the same claims that were raised and rejected for lack of jurisdiction and failure to state a claim by the court in the *LNV* Action." *Id*. at 3-4.[2]

The Defendant contends that Claims 1, 2 *and* 3 should be dismissed under Fed. R. Civ. P. 12(b)(1) (made applicable to adversary proceedings by Fed. R. Bankr. P. 7012(b)) ("Rule 12(b)(1)") because this Court lacks subject matter jurisdiction over them. It states "the *LNV* Court (and other courts)" have rejected those claims. *Id*. at 5. The *LNV* Court's determination that it lacked subject matter jurisdiction "has a preclusive effect on those claims here." *Id*.[3]

In what appears to be an alternative argument, the Defendant urges the Court to dismiss Claims 1 *and* 4 pursuant to Rule 12(b)(6). It complains that the Debtors are merely "rehash(ing) previously rejected allegations" *Id*. at 8; and "to the extent that the

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[2] The Defendant cites six (6) cases in which a federal court has adjudicated "Smith's and Hook's claims challenging their tax liabilities for tax years 1992-1996, 2001-2006, requesting a refund, seeking quiet title and damages." Motion at 4 n.2. The Defendant cites the following: *Smith v. Comm'r of Internal Revenue*, T.C. Memo. 2003-266, 2003 WL 22100685, *aff'd, sub nom. Hook v. Comm'r of Internal Revenue*, 103 Fed. Appx. 661 (10th Cir. 2004) (affirming Tax Court determination of Smith and Hook's tax deficiencies for the 1992-1996 tax years); *Smith v. Comm'r*, T.C. Memo. 2010-240, *3 *aff'd,* 458 Fed. Appx. 714 (10th Cir. 2012) (affirming Tax Court determination of Smith and Hook's tax deficiencies for the 2001-2005 tax years); *Smith v. Comm'r*, Docket No. 27995-09L, slip op. (Tax Court, Jan. 7, 2011); *Smith v. United States*, 101 Fed. Cl. 474, *aff'd,* 495 Fed. Appx. 44 (Fed. Cir. 2012) (affirming the Court of Federal Claims' rejection of Smith's claims relating to the "tax enforcement and collection actions taken against him and his wife" and challenges to tax deficiencies assessed against him for tax years 1992-1996 and 2001-2006, on jurisdictional grounds, and finding no federal district court would have subject-matter jurisdiction over Smith's claims because they had not paid the assessed taxes in full, a prerequisite to a tax refund suit); *Smith v. United States*, 2014 WL 6527980, *aff'd, sub nom. Hook v. United States*, 624 Fed. Appx. 972 (10th Cir. 2015); *LNV v. Hook*, 2015 WL 7962971(D. Colo. Dec. 3, 2015) (the District Court dismissed Hook's Compulsory Counterclaims [the same Compulsory Counterclaims which the Debtors have incorporated into their Complaint in this case] for the same reasons the District Court dismissed them in *Smith v. U.S.*, 2014 WL 6527980 (D. Colo. Nov. 20, 2014) (the "*Smith* Action") which reasoning was affirmed by *Hook v. U.S.*, 624 Fed. Appx. 972 (10th Cir. 2015)).

[3] The Defendant qualifies this broad assertion with respect to Claim 2 (for disallowance of the Proof of Claim filed by the Internal Revenue Service (the "IRS")). The Defendant appears to limit the scope of its Motion to dismiss Claim 2 for lack of subject matter jurisdiction under Rule 12(b)(1) as to its tax claim for tax years 2007 and 2009-2013. The Defendant explains in a footnote:

> The IRS's claim for tax years 2009-2013 relate only the Hook's tax liability. The United States acknowledges that no court has determined Hook's tax liability for 2009-2013, nor has a court determined Smith and Hook's tax liability for tax year 2007. Thus, the United States is not seeking dismissal of the claim objection for those taxes on *res judicata* grounds. However, the United States maintains that there may be grounds for this Court to abstain from adjudicating claims relating to those liabilities.

Motion at 8 n.4. The Defendant never explains its position that "there may be grounds for this Court to abstain from adjudicating claims relating to those liabilities." Despite the ambiguity of the Defendant's footnote, the Court construes the Defendant's explanation and acknowledgment to mean it seeks dismissal of Claim 2 for tax years 1992-1996, 2001-2006 and 2008 under Rule 12(b)(1) but for tax years 2007 and 2009-2013 only under Rule 12(b)(6).

LNV Counterclaim incorporated by reference in this action is the basis for Claims (1) and (4), these claims are barred by *res judicata*." *Id*.

The Defendant suggests that the Debtors' wholesale incorporation of their Compulsory Counterclaims in their Complaint is fatal to its viability, at least with respect to Claims 1, portions of 2, 3 and 4. The Defendant acknowledges that Fed. R. Civ. P. 10(c) (made applicable to adversary proceedings by Fed. R. Bankr. P. 7010) ("Rule 10"), permits a party to incorporate by reference a statement in a pleading "elsewhere in the same pleading or in any other pleading or motion." However, because the *LNV* Court considered and rejected the incorporated Compulsory Counterclaims, *LNV v. Hook*, 2015 WL 7962971 (D. Colo. Dec. 3, 2015), the Defendant maintains that this Court must reject them too. *Id*. at 9.

Finally, the Defendant contests the Debtors' Claim 5 for alleged violations of the discharge injunction asserting it should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Particularly, the Defendant notes:

> the only factual assertion made by Smith and Hook with regard to post-discharge actions taken by the United States is that "the United States and its counsel have. . . continued to pursue false and fraudulent claims for relief against Hook and Smith in the [*LNV* Action]. Compl. at p. 4. But this assertion does not allege a violation of the discharge injunction. The [*LNV* Action] is an *in rem* (foreclosure) action in which the United States in merely a defendant. It is not an *in personam* action. This difference is significant because *in rem* actions, which include actions to enforce a lien against encumbered property, are not prohibited by the discharge injunction.

Id. at 10-11 (citing *Johnson v. Home States Bank*, 501 U.S. 78 (1991); *Jester v. Wells Fargo Bank, N.A.* (*In re Jester)*, 2015 WL 6389290, at *5 (10th Cir. B.A.P. Oct. 22, 2015) *aff'd,* 656 Fed. Appx. 425 (10th Cir. 2016)).

IV. The Debtors' Opposition.

The Debtors' Opposition repeats verbatim the "allegations" of their Complaint. Opposition at 3-5. They rely on the Cover Sheet (Docket No. 1 at 8-9) which they filed with their Complaint as "proof" that the Complaint states a claim for relief. The Cover Sheet is an official form and it states: "the clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity." It is not a part of the Complaint. In the remainder of their Opposition, they reargue their "claims for relief" stated in their Complaint. Lastly, the Debtors challenge the sufficiency of what they refer to as the Defendant's "affirmative defense of *res judicata*." *Id*. at 8. The Debtors argue:

> [T]he United States has failed to make even a *prima facie* showing of the validity of its affirmative defense of *res judicata*. . . with respect to the claims for relief alleged by

> Hook and Smith in their Complaint and Jury Demand, much less proof of this affirmative defense by a preponderance of the evidence, as will be required at the Seventh Amendment jury trial. . . .

Id.

V. Issues Presented.

The Defendant's Motion requires the Court to decide if the Debtors' Complaint is sufficient with respect to Claims 1, 2, 3, 4 and 5. Particularly, does the *LNV* Court's dismissal of the Debtors' Compulsory Counterclaims bind the Debtors and the Defendant and prevent the Court from adjudicating those claims on *res judicata* grounds? Is this Court without jurisdiction over the Debtors' Refund Claim based upon the determination by higher courts of the United States that federal courts lacked subject matter jurisdiction over the Debtors' Refund Claim? May this Court take judicial notice of the records of the District Court and Tenth Circuit in ruling on the Defendant's Motion? Have the Debtors stated a claim for relief that they are entitled to damages for the Defendant's alleged conduct taken in the *LNV* Action which Debtors assert violated the discharge injunction? Have the Debtors presented the Court with a live "case or controversy" that the Defendant has taken any action or intends to take any action against them personally in violation of the discharge injunction? Do the Debtors have standing to object to the IRS Proof of Claim? Is any bankruptcy purpose served by disallowance of the IRS Proof of Claim?

The Court determines for the reasons set forth below that: (1) the Debtors are barred from relitigating the Debtors' Compulsory Counterclaims, which they incorporated into their Complaint, and which were dismissed for various reasons by both the *LNV* Court and the *Smith* Court; (2) to the extent a federal court higher than this Court has determined that federal courts do not have jurisdiction to hear the Debtors' Refund Claim (Claim 1) or to determine the Debtors' tax liability for certain tax years included within the IRS Proof of Claim, this Court is so bound and without jurisdiction; (4) in a related vein, this Court may take judicial notice of the cases cited by the Defendant and those in the records of cases involving the Debtors in both the District Court and the Tenth Circuit; (4) the Debtors do not allege any facts in support of their claim that the Defendant violated the discharge injunction, they do not allege that the Defendant has or intends to proceed against the Debtors personally, or that it has taken the position that its unsecured tax debts are excepted from their Discharge; and (5) in light of the insolvency of the Debtors' Main case, and because the Main Case is closed, the Debtors do not have standing to object to the IRS Proof of Claim, and no bankruptcy purpose is served by adjudicating the amount of any of the Debtors' tax liability stated in the IRS Proof of Claim.

The Court recognizes the Defendant's effort to remedy the Debtors' failure to comply with Rule 10 and to separate the wheat from the chaff. The Debtors' failure to comply makes the job of the party responding to their Complaint difficult, if not impossible. To facilitate its ability to respond to the Complaint, the Defendant has assigned numbers to what it interprets the Debtors to be claiming in their Complaint. But that effort has its drawbacks. For example, the Debtors allege that "[t]he United States and its counsel have continued to pursue their false and fraudulent claims for relief against Hook and Smith in [the *LNV* Action] in willful violation of the automatic stay, the discharge order, and

the discharge injunction" entered in the Debtors' Main Case (Complaint at 4). The Defendant has separated that "allegation" into two separate claims for relief, Claim 5, for damages for a violation of the discharge injunction, and Claim 6 for damages for violation of the automatic stay of 11 U.S.C. § 362(a). In its Motion, the Defendant seeks to dismiss Claim 5 but not Claim 6. Arguably, however, the challenges Defendant brings to Claim 5 may apply with equal force to Claim 6. Furthermore, if the *LNV* Court or others have rejected the Debtors' assertions that the United States violated the Section 362(a) stay, Debtors' Claim 6 might be subject to dismissal on *res judicata* grounds.

Similarly, the Debtors in their Claim 7 "request declaratory judgment that the 'Taxes or penalties owed to governmental units' are dischargeable and have been discharged in (their Main Case), and the IRS's lien on 'all of debtor(s) right, title and interest to property,' including 'debtor's principle residence' is void." Complaint at 5. Claim 7 *may* be subject to attack because the Defendant does not assert its debt claimed in its Proof of Claim is excepted from discharge as a personal liability of the Debtors; nor does it indicate any intention to collect such taxes from the Debtors personally. Moreover, to the extent the Debtors in their Compulsory Counterclaims repeat and rehash allegations against the Defendant which higher courts have adjudicated in the *LNV* Action and *Smith* Case, they too may be subject to *res judicata* or collateral estoppel.[4]

VI. Applicable Law.

A. Subject Matter Jurisdiction; Case or Controversy; Standing and Mootness.

The Defendant's primary contention is that prior federal courts have rejected and dismissed the Debtors' Compulsory Counterclaims for lack of subject matter jurisdiction. Rule 12(b)(1) permits a party to raise the defense of "lack of subject-matter jurisdiction" by motion rather than in a responsive pleading. Fed. R. Civ. P. 12(b)(1). The rule "empowers a court to dismiss a complaint for lack of subject matter jurisdiction. . . [I]t calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint." *Heath v. ROOT9B*, 2019 WL 1045668, at *3 (D. Colo. Mar. 4, 2019). The Court may dismiss a complaint at any stage of the proceedings, but the dismissal is without prejudice. *Id*.; Fed. R. Civ. P. 12(h)(3).

"Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. U.S.*, 46 F.3d 1000, 1002 (10th Cir. 1995) (internal citation omitted). If, however, a party challenges the factual basis for the court's subject matter jurisdiction, the second form,

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[4] The Debtors did not comply with Rule 10 when drafting their Complaint. They incorporated their Compulsory Counterclaims which were dismissed by the District Court and supplemented that with a jumble of assertions. The only thread of a factual allegation in support of Claim 6 is that "the United States and its counsel have refused to pay Hook and Smith their Social Security payments for the month of July, 2017, in willful violation of the automatic stay." Complaint at 4. But, they allege nothing more, and, by itself, may not rise to the level of stating a claim for relief.

the court "may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id*. at 1003; *Stuart v. Cocorilla, LTD.*, 2019 WL 529517, at *2 (D. Colo. Feb. 11, 2019). For example, if federal jurisdiction is based on diversity jurisdiction under 28 U.S.C. § 1332(a) and a party seeks to challenge whether the plaintiff meets the amount in controversy threshold, the court may be required to consider facts outside the complaint. *Id*., 2019 WL 529517, at *3-4.

The burden "of establishing subject matter jurisdiction is on the party asserting jurisdiction." *Heath*, 2019 WL 1045668, at *3 (citing *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)); *Stuart*, 2019 WL 529517, at *2. Similarly, "the party invoking federal jurisdiction has the burden of establishing standing." *Heath*, 2019 WL 1045668, at *3 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

Federal jurisdiction is limited so as to achieve a balance of powers among the three branches of government. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1546-47 (2016); *Town of Chester, New York v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1650 (2017). "Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester*, 137 S.Ct. at 1650 (citing U.S. Const. art. III, § 2, cl. 1.); *Spokeo*, 136 S.Ct. at 1547; *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 669 (2016). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo*, 136 S.Ct. at 1547.

The highest Court of this land has interpreted the "actual cases or controversies" requirement "to demand that 'an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.'" *Campbell-Ewald*, 136 S.Ct at 669 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). Furthermore, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Town of Chester*, 137 S.Ct. at 1650 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

The *Spokeo* Court instructs that "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy. . . The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo*, 136 S.Ct. at 1547. To have "standing," a plaintiff must "alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf." *Town of Chester*, 137 S.Ct. at 1650 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976)); *Heath*, 2019 WL 1045668, at *3. That plaintiff must: (1) have suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision." *Town of Chester*, 137 S.Ct. at 1650; *Spokeo*, 136 S.Ct. at 1547; *Heath*, 2019 WL 1045668, at *3. As *Heath* highlights,

> [t]the law in this circuit is clear that a plaintiff lacks standing if she "fail[s] to demonstrate the necessary causal connection between [her] injury and (the) defendants," including by failing to present evidence that the defendants "*have done or have*

> *threatened to do anything that presents a substantial likelihood of causing [plaintiff] harm*."

Heath, 2019 WL 1045668, at *3 (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156-57 (10th Cir. 2005)) (emphasis added).

If at any point during the litigation, however, "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,'. . .the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald*, 136 S.Ct. at 669 (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1528 (2013)). "Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *City of Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 918-19 (10th Cir. 2004) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). The Tenth Circuit further explained:

> [a] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. . . The crucial question is whether "granting a present determination of the issues offered . . . will have some effect in the real world."

Id. at 919 (internal citations omitted).

B. <u>Legal Standard for Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)</u>.

The Defendant urges the Court to dismiss Debtors' Claim 5 pursuant to Rule 12(b)(6). The Defendant asserts that the Debtors have not alleged it has taken any action in violation of the discharge injunction in their Main Case. It also seeks to dismiss Claims 1 and 4 under Rule 12(b)(6) but on different grounds, because a prior court has rejected the claims the Debtors allege in their Compulsory Counterclaims.

When considering a motion to dismiss under Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations in the complaint and views them in the light most favorable to the plaintiff. *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). A complaint will be dismissed unless it "contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A claim is considered "plausible" when the complaint contains facts which allow the Court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Plausible" does not mean "probable", although the plaintiff must show that its entitlement to relief is more than speculative. *Id.*; *Twombly*, 550 U.S. at 555. If the allegations in a complaint "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Put another way, "the complaint must give the Court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these*

claims." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

The Court is only bound to accept factual allegations as true and will not give deference to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 578. As a result, courts often begin their analysis by identifying allegations that are no more than conclusions and, therefore, not entitled to the "assumption of truth." *Id.* Legal conclusions must be supported by well-pleaded factual allegations, which can be assumed as true and evaluated as to whether they plausibly give rise to the requested relief. *Id.* This process is a context-specific task which depends on the elements of a particular claim and requires the Court to draw upon its judicial experience and common sense. *Burnett*, 706 F.3d at 1236.

C. *Res Judicata* Effect of Prior Jurisdictional Determinations.

The Defendant asserts that the Debtors' Claims 1 through 3 are barred on jurisdictional and *res judicata* grounds. "The preclusive effect of a judgment is defined by claim preclusion and issue preclusion,[5] which are collectively referred to as res judicata." *Jara v. Standard Parking*, 753 Fed.Appx. 558, 559 (10th Cir. 2018) (quoting *City of Eudora v. Rural Water Dist. No. 4*, 875 F.3d 1030,1034 (10th Cir. 2017)). The Supreme Court has held that "[t]he preclusive effect given to federal court judgments is a question of federal law." *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-10 (10th Cir. 2001) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001)).

The Defendant notes the tenet that, as a general matter, a dismissal of a complaint for lack of subject matter jurisdiction is not a decision on the merits and would not preclude a later decision by a second court on the merits. Motion at 5. "However, when a court dismisses a claim for lack of subject-matter jurisdiction, the court's determination on jurisdiction is a final judgment on the merits of the court's jurisdiction." *Id*. (citing *Matosantos*, 245 F.3d at 1209-10); *see also LNV Corp. v. Hook*, 2015 WL 7962971, at *5 (D. Colo. Dec. 3, 2015) (citing *Matosantos*, the *LNV* Court rejected Hook's argument that "dismissal for lack of subject matter jurisdiction in the *Smith* Action, is not res judicata and, therefore does not support a dismissal of [the Compulsory Counterclaims]" in the *LNV* Case).

The Tenth Circuit has been consistent in holding: "collateral estoppel prevent(s) a party from relitigating an issue critical to jurisdiction that had previously been decided in a prior lawsuit dismissed for lack of jurisdiction." *Matosantos*, 245 F.3d at 1210 (citing *Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F.2d 240 (10th Cir. 1979)); *see also Davis v. California*, 734 Fed. Appx. 560, 562 n.2 (10th Cir. 2018) (Although dismissal of a

[5] The Tenth Circuit in *Jara* defined each as follows: Issue preclusion "bars a party for relitigating an issue once it has suffered an adverse determination on the issue." *Jara*, 753 Fed.Appx. at 559 (quoting *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006)). On the other hand, claim preclusion "prevent[s] a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." *Id*. at 560 (quoting *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017)).

party in a prior lawsuit for lack of subject matter jurisdiction, "which is not a judgment on the merits, res judicata effect can still be given to such dismissal limited to the question of jurisdiction.").

D. ***Res Judicata* Effect of Dismissal for Failure to State a Claim**.

The Defendant also urges the Court to dismiss Claims 1 and 4 under Rule 12(b)(6) on the grounds of *res judicata*. As a general matter and as noted above, the court's review of a motion to dismiss under Rule 12(b)(6) is limited to the face and sufficiency of the compliant. *Id*. at *2. The court, however, may consider "attached exhibits, documents incorporated by reference, and 'documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" *Id*. at *3 (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Furthermore, "factual allegations that contradict . . . a properly considered document are not well pleaded facts that the court must accept as true." *Id*. (quoting *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1385 (10th Cir. 1997)). If a court exercises jurisdiction over a claim and later dismisses it for failure to state a claim under Rule 12(b)(6), that dismissal is on the merits. *Hagans v. Lavine*, 415 U.S. 528, 542 (1974). In other words, if a court previously adjudicated, (and dismissed), the Debtors' claims which they incorporate into their Complaint as failing to state a claim, that determination binds a subsequent court. The *LNV* Court dismissed the Debtors' Compulsory Counterclaims for failure to state a claim upon which relief can be granted. Thus, the same claims, when incorporated in the Complaint, are rendered implausible. If implausible, the claims may be dismissed in the current action for failure to state a claim upon which relief may be granted.

E. Judicial Notice of Records of Debtors' Related Cases.

The strength of the Defendant's Motion is the multiple decisions, published and unpublished, rendered by the *LNV* Court and the *Smith* Court. The Defendant cites many of them in its Motion. Motion at 4 n.2. Not to overstate the obvious, this Court is an adjunct of the United States District Court for the District of Colorado, where litigation between the Debtors and the Defendant and LNV is and has been pending for years. In addition, the District of Colorado is within the geographic purview of the Tenth Circuit Court of Appeals. This Court is subject to and bound by applicable legal precedent set by that Court.

Federal Rule of Evidence 201 governs when and how a court may take judicial notice of adjudicative facts. Fed. R. Evid. 201 provides in pertinent part:

> The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

> The court:
>
> (1) may take judicial notice on its own; or
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

Fed. R. Evid. 201(b) and (c).

The Tenth Circuit has held that:

> a court may, sua sponte, take judicial notice of its own records and preceding records if called to the court's attention by the parties. Further it has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.

St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp., 605 F.2d 1169, 1172 (10th Cir. 1979). The Tenth Circuit has recognized and endorsed the use of judicial notice of court files in related cases in the context of both motions for summary judgment, *id*., and motions to dismiss under Rule 12(b)(6). *Porter v. Ford Motor Company*, 917 F.3d 1246 (10th Cir. 2019) (Even when records from another action are "not included in the complaint, they are nevertheless properly considered. A court may look to documents subject to judicial notice in deciding a motion to dismiss.").

VII. Analysis.

The core of the Debtors' Complaint in this case is their Compulsory Counterclaims brought in the *LNV* Action and previously raised in the *Smith* Case. Both the *Smith* and the *LNV* Courts dismissed Debtors' claims. See *Hook v. U.S.*, 624 Fed. Appx. 972 (10th Cir. 2015) (The Tenth Circuit affirms the District Court's dismissal of Debtors' refund claim, claim for release of levies and return of levied property and quiet title action.); and *LNV v. Hook*, 2015 WL 7962971, at *5-6 (D.Colo. Dec. 3, 2015) (District Court dismisses Debtors' Compulsory Counterclaims for same reasons the *Smith* Action was dismissed.).

The Debtors attach to and incorporate in their Complaint, the Compulsory Counterclaims brought in the *LNV* Action. Thus, the Court may properly consider it in ruling on the Motion. In addition, the Defendant cites a number of cases in its Motion in which the United States Tax Court, the Tenth Circuit and the District Court have addressed the very claims the Debtors raise in the Complaint as Claims 1 through 5. On the authority of Fed. R. Evid. 201 and *St. Louis Baptist* and *Porter*, this Court may take judicial notice of those decisions and more recent decisions in the *LNV* Case, both reported and unreported.

For example, the Tenth Circuit, in affirming the District Court's dismissal of the Debtors' complaint in the *Smith* Case pursuant to Rules 12(b)(1) and (b)(6), set the stage:

> In the instant action, plaintiffs sought a credit or refund of nearly $1 million (plus any future increases in their tax liability due to allegedly improper levies on Mr. Smith's social security benefits payments) for payment or overpayment of federal income taxes, penalties, and interest for tax years 1992-1996 and 2001-2006. They also requested an abatement of penalties for those tax years, actual damages; the release of all federal tax liens; the return of all levied or seized property; the release of continuing levies on Mr. Smith's social security payments; an order quieting title to all their real and personal property; interest, costs, and all attorney's fees; and any other just relief. . . Plaintiffs sought a declaration that the orders, opinions and judgments of the United States Tax Court, the United States Bankruptcy Court for the District of Colorado, and the United States Court of Federal Claims were null and void *ab initio* because of numerous violations of Smith's and Hook's constitutional and statutory rights to due process of law.

Hook v. U.S., 624 Fed. Appx. 972, 974-975 (10th Cir. 2015). In the same opinion, the Tenth Circuit dismissed the Debtors' "quiet title claim" pursuant to Rule 12(b)(6) as "no longer viable once the court had determined that dismissal of the claims on which it depended (or from which it arose) was proper. *Id*. at 979. The Tenth Circuit recited the sections or paragraphs of the Debtors' complaint seeking to quiet title to their real and personal property. The paragraph quoted by the Tenth Circuit is exactly the same as the Debtors' Paragraph K in the Compulsory Counterclaims, the exhibit to Debtors' Complaint in this case. *Id*. *See* Compulsory Counterclaims ¶ IV. K.

Later that same year, the *LNV* Court described the claims the Debtors brought in that case:

> Hook's Compulsory Counterclaims in this action are nearly identical to the claims dismissed in the *Smith* Action. First, the claims are the same—Hook seeks to "recover[ ]. . . internal-revenue taxes erroneously or illegally assessed or collected, and penalties collected without authority, and sums that are excessive or were collected in a wrongful manner under internal-revenue laws, . . . and to quiet title to real and personal property. . . Next, Hook's attachments to the Compulsory Counterclaims are the same as those attached to the claims in the *Smith* Action. . . Finally, the relief Hook seeks is the same in all material respects—a refund/credit/set-off for amounts allegedly overpaid for tax years 1992-1996 and 2001-2006; the abatement of penalties and interest for such tax years; economic damages; the release of all federal tax liens; the return of all levied/seized property; the release of continuing levies on Smith's and Hook's social security

> payments; to quiet title to property; interest, costs, and legal fees and expenses; and other legal and equitable relief.

LNV v. Hook, 2015 WL 7962971, at *4 (D. Colo. Dec. 3, 2015). Finding that the Debtors had not properly postured their claim for a refund (as required by 26 U.S.C. § 7422(a)), the LNV Court dismissed that claim for lack of subject matter jurisdiction. *Id*. at *5. As for the Debtors' claim with respect to their outstanding tax liabilities for 1996, 2001-2005, 2006 and 2008,[6] the *LNV* Court also dismissed it for lack of subject matter jurisdiction for the Debtors' failure to comply with the full payment rule.[7] *Id*. at *6.

The *LNV* Court also observed:

> As in the Smith Action, Hook also seeks the return of levied/seized property under 26 U.S.C. § 6343; the release of tax liens . . .; and to quiet title to real and personal property under 28 U.S.C. § 2410. These remaining claims are also subject to dismissal on the same bases as stated in the Smith Decision, e.g., the failure to show the tax liabilities for which the levies were made have been satisfied, the failure to exhaust administrative remedies, and the failure to establish any improper clouds on title on which a quiet title claim may be based.

Id. at *6 (citing *Hook v. U.S.*, 2015 WL 4927272, at *5).

More recently, the Debtors sought to include in a Final Pretrial Order in the *LNV* Action, claims against the United States (and LNV) for allegedly violating the Debtors' Discharge entered in their Main Bankruptcy Case. *LNV v. Hook*, 2018 WL 2008699 (D. Colo. Apr. 30, 2018). Just as the Debtors claim in this case, the Debtors claimed there that by pursuing the *LNV* Action and the foreclosure sought therein, LNV and the Defendant were "'continuing their action to collect, recover, and/or offset' debts which have been discharged." *Id*. at *2. The LNV Court's rejection of that argument is instructive:

> Even if a debtor's personal obligations have been extinguished by an order of discharge, the "mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." This is because "a bankruptcy discharge extinguishes only one mode of enforcing a claim-namely, an action against the debtor *in personam*-

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[6] In a footnote, the *LNV* Court added a caveat: "[t]he Court does not read the Compulsory Counterclaims as asserting a claim based on the 2008 tax year, but Hook did not take exception to the United States' argument [that the Court lacked subject matter jurisdiction]. Therefore, assuming the 2008 tax year is at issue, the analysis applies equally to the 2008 tax year." *LNV v. Hook*, 2015 WL 7962971, at *6 n.13.

[7] The "full payment rule" codified in 28 U.S.C. § 1346, affords the district court original jurisdiction over actions against the United States for the recovery of certain internal revenue taxes. But the tax payer must pay the full amount of the tax in dispute. *LNV v. Hook*, 2015 WL 7962971, at *6. The failure to do so, on the other hand, deprives the district court of subject matter jurisdiction. *Id*.

> while leaving intact another-namely, an action against the debtor *in rem*. Accordingly, the Bankruptcy Court [this Court] found, in granting [LNV] relief from the automatic stay, [LNV] is allowed to proceed "in accordance with any order(s) entered in [the *LNV*] case to judicially foreclose on certain real property" . . . but not to "proceed to collect any deficiency resulting from such foreclosure against the Debtors or their post petition property."

Id. (referring to and quoting this Court's "Order Granting Motion for Relief from Automatic Stay" (Docket No. 50 in the Main Case)). The *LNV* Court further noted that the United States, as a defendant in the *LNV* (foreclosure) Action,

> has no claims pending in this action. The United States argues Defendants miscomprehend the effect of the Order of Discharge. The Court agrees. As the Tenth Circuit stated to another debtor who argued that a secured creditor violated the automatic stay and discharge injunction with a post-discharge foreclosure on secured property:
>
> > He [debtor] fails to appreciate the difference between the discharge of their personal obligation on the loan secured by the property and Wells Fargo's [creditor] continued interest in the property via the security instrument. The former was discharged, the latter was not.

Id. at *2-3 (quoting *Jester v. Wells Fargo Bank, N.A. (In re Jester)*, 656 Fed. Appx. 425, 428 (10th Cir. 2016)). *See also*, *LNV v. Hook*, 2018 WL 1242006, at * 2 (D. Colo. Mar. 9, 2018) ("As the Court indicated in its earlier Order (ECF No. 355), Defendants' [Debtors'] bald assertions failed to show that proceeding with this action [the *LNV* Action] violates the Order of Discharge, as they contend. Such assertions failed to sufficiently allege any claims (or defense). The same holds true as the Defendants allegations that Defendant United States is violating the automatic stay; any such violation claimed had not been plausibly plead.").

The record before the Court is comprised of the Debtors' Complaint, their Compulsory Counterclaims, which they incorporated into their Complaint, and the various reported and unreported decisions of higher courts rejecting the Debtors' claims they seek to litigate in this case. The District Court dismissed the Debtors' Compulsory Counterclaims for lack of subject matter jurisdiction related to Claims 1 and 2. This Court is bound by that determination and is therefore without subject matter jurisdiction to revisit the Debtors' refund claim and their objections to the IRS's Proof of Claim for the tax years which are the subject of both the *Smith* and *LNV* Cases.

To the extent the Debtors seek disallowance of the IRS's Proof of Claim, the Debtors lack standing to object. *See In re Morreale*, 2015 WL 3897796 (Bankr. D. Colo. June 22, 2015) (Chapter 7 Debtor who failed to show any pecuniary interest in matters

affecting administration of the estate has no standing to object to such matters). The record of the Main Case demonstrates that the Debtors' estate was grossly insolvent leaving a pittance to pay creditors and no hope of any surplus to be returned to the Debtors. Furthermore, the Debtors' Main Case has been closed. Disallowance of any filed proof of claim serves no purpose whatsoever.

As to Debtors' Claims 3 (the quiet title claim), 4 (the damages claim for the Defendant's alleged misconduct in the *LNV* Action) and 5 (the claim for damages for the Defendant's alleged violations of the Discharge Order), the *LNV* Court's dismissals of each for either lack of subject matter jurisdiction or failure to state a claim bind this Court. Finally, applying the reasoning of the *LNV* Court when it addressed and discounted the Debtors' allegations that the Defendant violated the Discharge Order, the Debtors fail to state a claim under Rule 12(b)(6). The Defendant is also a defendant in the *LNV* Action. LNV named the United States as a defendant because it holds a tax lien against the Debtors' real property which LNV seeks to foreclose. The Debtors fail to state any claim that the Defendant by relying on or enforcing its lien has or will violate the Discharge Order.

Through their Complaint, the Debtors endeavor to relitigate the same claims they have been asserting for over a decade in the District Court, the Tax Court and in the Tenth Circuit. Each court roundly rejected the Debtors' Claims. Just as those higher courts have concluded they do not have subject matter jurisdiction to litigate Debtors' refund and tax claim disputes, this Court is bound by those jurisdictional determinations and must conclude the same. The Debtors rely heavily, almost exclusively, on the incorporation of their Compulsory Counterclaims into their Complaint. The Compulsory Counterclaims were rejected by the *LNV* and *Smith* Courts. Thus, the incorporation of those claims and the prior rulings thereon are fatal to the same claims in this case.

VIII. Remaining Claims: Claims 6 and 7.

As noted, the Debtors did not comply with Rule 10. As a result, the Defendant and this Court are left with the difficult task of straining to determine what are the Debtors' factual allegations and claims. Such failure weighs against the Debtors and the burden which rests on them to establish this Court's jurisdiction and to withstand a motion to dismiss. However, here, the Defendant did not move to dismiss what it labeled Debtors' Claims 6 and 7. Claim 6 is the Debtors request for an award of damages based on the United States alleged violations of the automatic stay. Claim 7 is their request for declaratory relief determining that the taxes which are the subject of the IRS Proof of Claim have been discharged in their Main Case. The only hint of an allegation of fact is that the United States improperly seized the Debtors' July 2017 social security payments. They offer no specifics of the alleged offset and do not allege any injury. They only allege in conclusory fashion that they are entitled to damages. The Debtors also fail to allege in any manner that the United States views its debt claimed in the Proof of Claim as other than discharged as a personal liability of the Debtors. Thus, it would appear, that the viability of those claims is also in question.

IX. Conclusion and Orders.

The Court concludes that it lacks subject matter jurisdiction to adjudicate Debtors' Claim 1, Claim 2, Claim 3 and Claim 4. Further, the relitigation of such claims is barred under principles of *res judicata*. With respect to Claim 2, the Debtors also lack standing to pursue such claim and no bankruptcy purpose is served by litigating a proof of claim in a closed insolvent estate. The Debtors have failed to state a claim upon which relief may be granted with respect to Claims 1, 2, 3, 4 and 5. As to Claims 6 and 7 which are not the subject of the Defendant's Motion, such claims are of dubious merit. Accordingly, the Court:

ORDERS that the Defendant's Motion is GRANTED and the Debtors' Claims 1, 2, 3, 4 and 5 are dismissed; and

FURTHER ORDERS that the Debtors and the Defendant shall show cause in writing filed within 21 days of the entry of this Order why the Debtors' Claims 6 and 7 should not be dismissed also.

DATED this 3rd day of April, 2019.

BY THE COURT:

Thomas B. McNamara

Thomas B. McNamara
United States Bankruptcy Judge